Sociedad Española de Auxilio Mutuo y Beneficencia de P.R. a/k/a Hospital Español Auxilio Mutuo de Puerto Rico, Inc. *and* Unidad Laboral de Enfermeras(os) y Empleados de La Salud. Cases 24–CA–7993, 24–CA–8024, 24–CA–8048, 24–CA–8069, 24–CA–8091, 24–CA–8181, 24–CA–8198, 24–CA–8206, 24–CA–8266, 24–CA–8276, and 24–CA–8437

July 13, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 30, 2001, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed one cross-exception. The General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The Respondent is a health care institution located in San Juan, Puerto Rico. The Union, ULEES, was certified as the exclusive bargaining representative of the Respondent's registered nurses in 1977. On December 15, 1994, the Board conducted an election in units A (about 350 office clericals, including telephone operators), B (business office clericals), and C (about 150 technical employees, including respiratory therapists, radiology (X-ray) technicians, and operating room technicians). Thereafter, the Respondent filed election objections. On January 15, 1997, the Board certified the Union in unit C. On December 31, 1997, the Board certified the Union in unit A. Bargaining began in early to mid-1998.

The complaint alleges that the Respondent violated: (1) Section 8(a)(1) by disparately enforcing a no-solicitation/no-distribution policy against its unionized employees, telling employees that it was locking them out in retaliation for their union activities, and seeking to have employees decertify the Union; (2) Section 8(a)(3) and (1) by discharging employee Elsa Romero, and locking out its employees; and (3) Section 8(a)(5) and (1) by subcontracting bargaining unit work. The judge found all of the alleged violations. The Respondent has essentially excepted to all of the judge's conclusions. For the reasons stated below, we adopt the judge's conclusions, except as to the 8(a)(3) lockout allegation, and the related independent 8(a)(1) allegation. For ease of reference, we address the issues in the same order as did the judge in his decision.

1. Subcontracting

We agree with the judge that the Respondent violated Section 8(a)(5) by subcontracting bargaining unit work. As the judge correctly found, the Board has held that subcontracting is a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise. *Torrington Industries*, 307 NLRB 809 (1992). We agree with the judge that the Respondent demonstrated neither a change in the scope and direction of the enterprise, nor any compelling economic reasons that would have justified unilateral changes during the pendency of the election objections.[3]

2. Solicitation/distribution

We agree with the judge that the Respondent violated Section 8(a)(1) when its security guards prevented employee (and union president) Ana Melendez from distributing union literature, during her lunch hour, in the hospital cafeteria. As the judge found, the Respondent produced insufficient evidence to support its claim that Melendez engaged in any misconduct, nor did the Respondent demonstrate that Melendez was distributing during her work hours.[4]

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), affd. 354 F.3d 534 (6th Cir. 2004).

[3] We find merit in the Respondent's exceptions to the extent that they argue that the judge apparently converted what was a stipulation to admit the contracts into the record as joint exhibits into a substantive stipulation as to when subcontracting began. Even so, we believe that the evidence adduced by the Respondent did not establish any consistent past practice of subcontracting that predated the date the Respondent's bargaining obligation arose, i.e., the December 15, 1994 election date.

[4] The complaint alleged that the Respondent enforced its no-solicitation/no-distribution rule (rule 28) only against employees who assisted the union. Rule 28 prohibits distribution by employees in "areas strictly dedicated to patient care." In nonpatient care areas, rule 28 prohibits distribution by employees during their working hours. The judge found, and we agree, that Melendez was distributing in a nonpatient care area (the cafeteria) during her nonworking hours. Thus, in our view, rule 28 was not applicable in these circumstances (and, indeed, the Respondent's warning letter to Melendez does not refer to rule 28). Accordingly, we view the nature of this violation not so much as disparate enforcement, but rather as a simple 8(a)(1) restraint on an employee's Sec. 7 rights.

3. Decertification

The General Counsel alleged that the Respondent, on two separate occasions, solicited its employees to decertify the Union. The first occasion allegedly occurred in early 1999, and involved Supervisor Blanca Hernández. The judge found that Hernández conducted a meeting with employees, in which she advised them how to collect signatures for a decertification petition,[5] urged them to sign such a petition because they had lost benefits, and told them that the Respondent would no longer be able to give them previously promised raises because they had become unionized.[6] The judge further found that, subsequent to this meeting, Hernández called employee Barbara Feliciano into her office and asked her to sign a paper containing the signatures of other employees desiring decertification.

The second occasion occurred in January 1999. The judge credited employee Sally Rodriguez' testimony that the Respondent's supervisor, Evelyn Soto, distributed a flyer to Rodriguez and another employee, which flyer described employee benefits before and after the Union, stated that if employees did not want to continue to put their benefits at risk they should sign the list to decertify the Union, and stated that the employees would lose everything if they continued with the Union.[7]

We agree with the judge that the General Counsel established, with his evidence regarding the first occasion (Hernández/Feliciano), that the Respondent violated Section 8(a)(1) by unlawfully encouraging and assisting in the circulation of a decertification petition. An employer may not "initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures and the filing of the petition." *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) (footnotes and citations omitted). Hernández' actions clearly violated this proscription as the judge described. Given that conclusion, we find it unnecessary to pass on whether the second occasion presented by the General Counsel (Soto/Rodriguez) also violated the Act.

4. Employee Elsa Romero's discharge

The facts surrounding Romero's discharge are fully set forth in the judge's decision. Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), the judge initially found that the General Counsel had carried his initial burden of proving Romero's protected union activity was a substantial or motivating factor in her discharge. Specifically, the judge found that the General Counsel established that: (1) Romero was one of the Union's strongest and most vocal advocates; (2) the Respondent knew of Romero's activities; (3) the Respondent took adverse employment action against Romero (discharge); and (4) the Respondent harbored animus against protected union activity, as demonstrated by both its unlawful interference with Melendez' attempts to distribute union literature and by its attempts to decertify the Union. Moreover, the judge found that Carmen Martínez, respiratory department manager, had told Romero, a few months before her discharge, that she was exposing herself too much by talking to the press. According to the judge, this "veiled threat," though not alleged as a violation, further demonstrated animus. The judge next found that the Respondent had not met its *Wright Line* burden to show that it would have discharged Romero even in the absence of her protected conduct. In this regard, the judge found that Respondent's explanation for the discharge, that Romero was discharged for a bad disciplinary record and for false invoicing, was pretextual.

We agree with the judge that the Respondent violated Section 8(a)(3) by discriminatorily discharging Romero.[8] In so doing, we emphasize the following factors, also relied on by the judge. First, we agree with the judge that Carmen Martínez failed to conduct a full investigation into the conduct that allegedly was the primary reason for Romero's discharge (the October 18, 1998 double-billing).[9] As noted by the judge, Martínez did not ask Romero where she had recorded the treatments; the Respondent did not produce the October 17, 1998 11 p.m.–7 a.m. shift notes or Lopez' medical file, the two places Romero claims she recorded or placed the treatment notes;[10] and Martínez did not question other thera-

[5] This conduct was not in response to any employee question as to how to decertify the Union.

[6] This conduct is not separately alleged as a threat.

[7] This conduct is not separately alleged as a threat.

[8] We have modified the notice, consistent with the judge's decision and recommended Order, by the addition of a make-whole remedy provision for Romero.

[9] This failure was a departure from the Respondent's rule requiring a full investigation. In adopting the judge's finding that the Respondent's discharge of employee Romero violated Sec. 8(a)(3), Member Schaumber does not rely on the judge's finding that the Respondent failed to fully investigate the double-billing incident. Supervisor Martínez investigated the matter by calling Romero in and questioning her about the matter and by asking Clinical Supervisor Aguilú to check the clinical files. Although J. Martínez and Aguilú did not testify at the hearing, Martínez testified that Aguilú told her that J. Martínez had treated the two patients. Martínez then checked the billing records and found that Romero and J. Martínez had both billed for the services. Under these circumstances, Member Schaumber would not fault the Respondent for failing to exhaust every possible avenue of inquiry. However, he agrees that the Respondent did not prove that it would have discharged Romero even absent her union activity based on the remaining reasons cited by his colleagues, including the absence of *any* investigation concerning Galindez' complaints about Romero and the Respondent's unsubstantiated claim that it was following a progressive discipline policy.

[10] The judge's reference to files not produced was *not*, as the Respondent would have us believe, for the purpose of suggesting that original medical files were not in the hearing room (they apparently were), but that specific documents relevant to resolving this issue were absent. Thus, the judge found that the Respondent produced no respira-

pists who worked on October 18, 1998, from whom she would have learned that Romero, not J. Martínez, was assigned to treat the second floor "stand-by" patients. We further note, as did the judge, that Martínez—rather than investigating complaints about Romero made by RN Galindez and shift coordinator Nuñez that were cited by the Respondent as a basis for Romero's discharge—simply accepted the complaints as true, without affording Romero an opportunity to refute them. Finally, we agree with the judge's assessment that the Respondent's argument that Romero was discharged in accordance with a progressive discipline system fails because the Respondent produced no evidence that it follows such a system.

5. Lockout

Finally, we turn to the two lockout-related issues: (1) whether the Respondent violated Section 8(a)(3) and (1) by locking out its employees in the face of a strike-threat, and (2) whether the Respondent independently violated Section 8(a)(1) by telling employees that it was locking them out in retaliation for their union activities.

A brief review of the facts, as found by the judge, is useful here. On December 4, 1998, the Union notified the Respondent that it would conduct a 48-hour work stoppage beginning on December 22 and ending on December 24. On December 14, the Union notified the Respondent that it would conduct a second work stoppage beginning on December 31, 1998, and ending on January 2, 1999. The Respondent, by its hospital administrator, Ivan Colón, decided to conduct a lockout between these two stoppages. On December 21, Human Resource Director Maria Román sent a letter to the Union, and distributed letters to employees, notifying them of the lockout. Later that night, about 8:15 p.m., Union President Melendez phoned Román. Melendez said that the Union was canceling its first strike, and that Román would be receiving a fax to that effect. Upon receiving the fax, rather than canceling its planned lockout, the Respondent moved the lockout forward to December 22 to coincide with the time the first strike had been scheduled to begin. Certain employees reported to work on December 22, even though they had been informed of the lockout, and were told to leave the premises. One of those employees, Rafael Cintrón, made a comment that this is the way the institution "paid the long-time employees," by "kicking" them out. According to Cintrón, Román overheard this comment and responded that the "reprisal" was not against the employees, but against the Union.

Employee Jose Reyes, overhearing Román's remark, testified that Román had said that "we shouldn't take it as a personal thing, that they were not against us but rather against the Union." The judge credited Cintrón and Reyes and reasoned that Román's remark was coercive because it indicated that the lockout was intended as a reprisal against the Union, not the employees, and could likely have the effect of causing employees to withdraw support from the Union.[11]

In finding the alleged 8(a)(3) violation, the judge reasoned that, because the Board and the courts have held that lockouts are not "inherently destructive" of employee rights, the legality of the Respondent's lockout must be determined using the *Great Dane* "comparatively slight" impact test. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Under that test, an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of "legitimate and substantial business justifications" for its conduct. The judge found that, here, the Respondent had failed to establish such business justifications; hence, the lockout was unlawful.

In support of his finding that the Respondent had failed to meet its burden, the judge reasoned that the Respondent's stated justification for the lockout (and for its advancement)—the difficulty of recruiting people to work solely during the two strike periods—lacked evidentiary support and was purely speculative. Alternatively, the judge found that, even had the Respondent established legitimate and substantial business justifications, the General Counsel had carried his burden of proving that the lockout was discriminatorily motivated. In this regard, the judge relied on Román's statement—that the lockout was intended as a reprisal against the Union—as proof that the Respondent was not motivated by legitimate business concerns, but by a desire to encourage employees to withdraw support from the Union. The judge also relied on context, emphasizing that the lockout must be considered in tandem with the Respondent's other discriminatory conduct, including its unlawful discharge of Romero 2 months before the lockout and its decertification efforts soon after the lockout.

The Respondent does not dispute the judge's statement of law, but takes issue with his application of the law to the facts. The Respondent claims that its decision to call a lockout, and subsequently to advance it (when the Union belatedly called off its first strike), was a necessary response to the instability caused by the Union calling two strikes during the critical holiday period. The Respondent argues that the judge's rejection of its asserted

tory care notes for either patient for the 11 p.m.–7 a.m. shift, beginning October 17 and ending October 18, 1998. This is important because Romero testified that she recorded therapy for one patient on the respiratory care notes of that shift, and that such notes were not always kept in chronological order. As to the other patient, Romero claims that she made notes on a separate respiratory care sheet in that patient's file. The judge accepted the General Counsel's argument that the Respondent "chose not to produce" the shift notes or file "because they would have corroborated rather than undermined Romero's testimony." We see no basis for reversing that finding.

[11] The judge gave due consideration to the fact that Reyes' version did not specifically mention "lockout" but he found that this clearly was its intended meaning, a reasonable assessment under the circumstances.

business justification demonstrates his misunderstanding of the relevant employment market in Puerto Rico. The Respondent asserts that it needed to maximize incentives for temporary employees to work during the holidays, and that its business decision should not be second-guessed. The Respondent further asserts that following the judge's analysis would require the hospital to play dice with patient care, and would effectively allow the Respondent to avert a finding of liability only by proving employees did not actually show up for work after the fact, a "speculative brinkmanship and inexperienced gamble" which could lead to patients' deaths. According to the Respondent, the Union's cancellation of the first strike came too late to change the Respondent's evaluation of patient needs—had the cancellation come earlier or had the second strike also been canceled, the Respondent asserts that it would have called off the lockout.

The Respondent also takes issue with the judge's alternative finding that, assuming that the Respondent had demonstrated a legitimate and substantial business interest, the General Counsel then carried its burden of proving that the lockout was discriminatorily motivated. Noting that this portion of the judge's analysis rests on Reyes' and Cintrón's testimony, the Respondent argues that Reyes' testimony should carry little weight (because he did not specifically mention the lockout as the subject of Román's remark), and that Cintrón's credibility is suspect. Finally, the Respondent argues that the judge's rejection of Román's testimony (i.e., that she and Colón considered the impact that canceling the lockout would have on temporary workers), because that testimony was not repeated by Colón, is contrary to the record.[12]

We find merit in the Respondent's exceptions as they relate to the 8(a)(3) allegation. The judge is correct that, because a lockout, standing alone, is not inherently destructive of employee rights, we must analyze the lockout under the second prong of the *Great Dane* test, with reference to *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965). *Central Illinois Public Service Co.*, 326 NLRB 928 (1998), review denied sub nom. *Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000). Thus, if an employer comes forward with evidence of legitimate and substantial business justifications for its conduct, then the General Counsel must prove antiunion motivation. The judge found here, in sum, that the Respondent had not come forward with evidence of legitimate and substantial business justifications, but, even if it had, the General Counsel proved antiunion motivation. We disagree on both counts. In *American Ship*, above, the Supreme Court examined whether an employer commits an unfair labor practice when it locks out its employees during a labor dispute to bring economic pressure to bear in support of its bargaining position. The Court there was concerned with the status of the "bargaining lockout," id. at 308, and it found that such a lockout did not "fall into that category of cases arising under [Section] 8(a)(3) in which the Board may truncate its inquiry into employer motivation." Id. at 312. The Court expressly noted: "the Board itself has always recognized that certain 'operative' or 'economic' purposes would justify a lockout." The Board's error was its ruling that "only these purposes will remove a lockout from the ambit of [Section] 8(a)(3)." Id. at 313. In reviewing those classes of lockouts that the Board had historically exempted from proscription, the Court included lockouts "to safeguard against . . . loss where there is reasonable ground for believing that a strike was threatened or imminent." Id. at 307, quoting *Quaker State Oil Refining Corp.*, 121 NLRB 334 (1958). See, also, *C-E Natco/C-E Invalco*, 272 NLRB 502, 505–506 (1984); *Link Belt Co.*, 26 NLRB 227, 264 (1940).

Here, the Respondent had reasonable grounds for believing that a strike was imminent. Indeed, the Union had sent the Respondent two strike notices, indicating its plans to strike twice about 1 week apart during the holiday season. The Respondent cited continuity of patient care as its primary concern, and as the operative purpose, for the lockout. We conclude, contrary to the judge, that it was this operative purpose, rather than antiunion animus, that motivated the Respondent. It is this operative purpose that provides the legitimate and substantial business justification under *Great Dane*.

More specifically, the Respondent announced the lockout on December 21. At that time, it was faced with the prospect of a strike on December 22–24 and another strike on December 31 to January 2. The Respondent, for the sake of its patients, needed a reliable supply of employees for the holiday period of December 22 to January 2. The Respondent's witnesses testified, based on their experience, that it would be difficult to recruit employees over the Christmas/New Years holiday, in view of the traditional importance of this time as one to be shared with family and friends. The recruitment would be doubly difficult because the Respondent would need employees who would work for 2 days (December 22–24), then be laid off for 6 days (December 25–31) and then work again for 2 days (January 1 and 2). Thus, the Respondent decided to lock out its employees from December 22 to January 2. That would permit the hiring of temporary employees on an uninterrupted basis for the entire period.

[12] The Respondent argues, alternatively, that the judge failed to find (or even to discuss) its argument that the Union did not comply with Sec. 8(d)(B)'s 30-day notice requirement. The Respondent contends that employees who strike without the proper notice under Sec. 8 commit an unfair labor practice and are unprotected by the Act. Thus, according to the Respondent, any allegation that it acted in reprisal of an unprotected activity must be dismissed as a matter of law. Given our conclusions below, we find it unnecessary to pass on this alternative argument.

Our colleague argues that the Respondent did not *prove* that it would be unable to find qualified persons who would work from December 22–24, and then return to work from December 31 to January 2. That is, as our colleague would have it, the Respondent had to take its chances that qualified persons could be found for the erratic work schedule. If they could not, the health of its patients would be jeopardized. We disagree with our colleague. We believe that it is enough that the Respondent was *reasonably concerned* that it would not be able to find the requisite personnel. That concern, for its business and its patients, was the substantial and legitimate reason for its actions.[13]

We recognize that, after the lockout was announced on December 21, the Union canceled its strike for December 22–24. However, the Respondent could reasonably be concerned that the "11th hour" cancellation would not be true and effective. Further, even if the cancellation were true and effective, replacements had already been hired. Indeed, the record shows that about 30 provisional hires were already sleeping in the hospital. Finally, the Respondent was still faced with a strike for December 31. Thus, rather than gamble with patient care, it stuck to its lockout plan.

We recognize that the Board does not apply different standards with respect to lockouts merely because a health care facility is involved. *Hospital Episcopal San Lucas*, 319 NLRB 54 (1995). Here, however, we believe that the Respondent had legitimate operative concerns. Specifically, we note that:

- The intended strikes were massive, covering about 500 employees,
- 40–50 strike replacements were already in place, spending the night in the hospital, by the time the Union canceled the strike,[14]
- The Respondent was concerned that, if it sent the replacements home, it might not be able to fully staff the morning shift, the most critical shift of the day.
- The Respondent feared that, if it canceled the strike replacements for the first strike, they would not show up for the second strike (which had not been canceled).
- Upon being notified of the strikes, Colón had met with the Chief of Staff and their primary concern was the difficulty of recruiting personnel during holidays.

The judge relied on the fact that, rather than call employees and tell them to report for work, the Respondent called employees and told them not to report. However, this conduct is in fact what a lockout is, and we have found the lockout to be lawful.

We thus reject the judge's conclusion that the Respondent failed to present evidence of legitimate and substantial business justifications for locking out its employees. We further reject the judge's alternative finding that, in any event, the General Counsel had proved animus against protected union activity. Even in the context of the other violations, we are persuaded that the motivation behind the lockout in this case was operational, not discriminatory.[15]

Our colleague asserts that Román's reference to the Union as the cause of the lockout, set forth above, is proof that the lockout was motivated by antiunion animus. We disagree. It was the Union's threat to strike that was the cause of the lockout. But for the Union's threat, there would not have been a lockout. Thus, it was not unreasonable—indeed, it was truthful—for Román to blame the Union for the lockout. Further, Román was not the decision-maker—Colón was. Colón never cited reprisal against the Union among any of the factors motivating his decision to conduct a lockout. For similar reasons, we conclude that Román's statement was not unlawful under Section 8(a)(1).

Our colleague asserts that Romero said that the lockout was "intended to punish the Union." The testimony is different. Both General Counsel witnesses testified that Romero's focus was on distinguishing between the Union and the employees as the cause of the lockout. Inasmuch as the Union had called the two successive strikes and inasmuch as the planned strikes caused the lockout, Romero's words were accurate. Further, as noted, Romero was not the decision-maker. In sum, Romero's words are far too slim a reed upon which to premise a conclusion that the lockout was unlawfully motivated. Rather, as discussed above, all of the other evidence shows that the lockout was a legitimate response to the planned strikes.

ORDER

The Respondent, Sociedad Española de Auxilio Mutuo y Beneficencia de P.R. a/k/a Hospital Español Auxilio

[13] We agree with our colleague that, under *ConAgra, Inc.*, 321 NLRB 944 (1996), an employer must adduce evidence to support its concern. In the instant case, there is unrebutted testimony supporting the concern.

[14] Moreover, the Union's 11th hour cancellation put the Respondent in an untenable position—if it did not go through with the lockout, it would either have to bear the added expense of paying both the unit employees and the replacements, or not pay the replacements, who would then be unlikely to remain available to cover the second strike because it, too, might be canceled. While the Union's tactic might not be unlawful, the Respondent was entitled to implement the lockout in response to it.

[15] See, e.g., *Central Illinois Public Service Co.*, above. There, the Board adopted the judge's findings that the employer violated Sec. 8(a)(3) (by discontinuing health insurance benefits), and Sec. 8(a)(5) (by failing to provide information), *but* the majority declined to infer from these violations that the lockout was unlawfully motivated and was for the purpose of evading its duty to bargain.

Mutuo de Puerto Rico, Inc., Hato Rey, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Subcontracting out bargaining unit work without first notifying the Union about its decision, and affording it an opportunity to bargain over the decision and its effect on bargaining unit employees.

(b) Discharging, or otherwise discriminating against, employee Elsa Romero or any other employee for supporting ULEES, or any other union.

(c) Interfering with employees' Section 7 rights by prohibiting them from distributing union literature during nonworktime in the Hospital cafeteria, and by sponsoring, supporting, or encouraging unit employees to file a decertification petition.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Discontinue subcontracting its X-ray technician unit work to GK Professional Services and its respiratory therapy unit work to Respicare, and on request, bargain with ULEES over any decision to subcontract out bargaining unit work and its effect on unit employees.

(b) Within 14 days from the date of this Order, offer Elsa Romero full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Elsa Romero whole for any loss of earnings and benefits suffered by her as a result of her unlawful discharge, with interest, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to Romero's unlawful discharge and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in San Juan, Puerto Rico, in English and Spanish, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 1998.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 13, 2004

Robert J. Battista,	Chairman
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Contrary to the majority's opinion, the evidence clearly supports the judge's finding that the Respondent employer locked out its employees to punish the Union for calling a lawful strike, just as the employer's human resources director told employees (a statement that itself violated the Act).[1] It was the Respondent's burden to establish legitimate and substantial business justifications for the lockout: here, the claimed difficulty in finding replacement workers. But on that score my colleagues simply give the Respondent a free pass, accepting a rationale without demanding proof, under circumstances that reveal the Respondent's true motive.

I.

Only a brief summary of the facts is necessary: The Union notified the Respondent that it would conduct work stoppages on December 22–24 and on December 31 to January 2 to protest unfair labor practices. In response, the Respondent decided to lock out employees on December 24–30—i.e., between the two planned

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] In all other respects, I agree with the majority, except that I would also find (in agreement with the judge) that the Respondent unlawfully solicited signatures for a decertification petition on the second occasion discussed in the majority opinion (the Soto/Rodriguez incident).

strikes—assertedly to make it easier to recruit replacements workers, who would thus have a continuous period of employment. The Union learned of the planned lockout on December 21, the day before its first planned work stoppage, and promptly advised the Respondent that it was canceling the strike.

In response, the Respondent did not call off the lockout. Instead, it advanced the lockout to the next morning, to coincide with what would have been the commencement of the strike. Employees were called and told not to report to work; those employees who reported to work were sent away. The Respondent's human resources director, Maria Román, told employees that the lockout was not directed at them, but was intended to punish the Union.

II.

There is no dispute as to the controlling legal principles here. The Respondent was required to establish "legitimate and substantial business justifications" for the lockout; if the Respondent met its burden, then the General Counsel must prove antiunion motivation. See generally *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Reversing the judge, the majority finds that the Respondent has met its burden and that the General Counsel has failed to carry his. I disagree on both points.

First, the Respondent never *proved* that it would have had difficulty in finding replacement workers during the Union's two planned strikes, as opposed to the single continuous period created by the lockout as originally planned. As the judge found, the Respondent did not engage in any recruitment efforts at all before it supposedly concluded that finding replacement workers would be hard. In the judge's words, the conclusion was based on "nothing more than supposition and conjecture." My colleagues say that it "obviously" would be difficult to recruit employees who would work the two strike periods. But, as the judge correctly observed, it is no less plausible to believe that temporary workers might have been eager to supplement their regular weekly income by accepting the two limited assignments. In the absence of evidence on this point, then, the Respondent can hardly be found to have carried its burden. Articulating a plausible reason for a lockout is not enough. See, e.g., *ConAgra, Inc.*, 321 NLRB 944, 963 (1996), enf. denied on other grounds 117 F.3d 1435 (D.C. Cir. 1997) (rejecting employer's claim that lockout was justified to prevent sabotage by employees where employer failed to adduce any evidence substantiating its concern).[2]

Second, even if the Respondent had met its burden, the judge correctly found that the lockout was motivated by antiunion animus, not business justifications. The admission by Human Resources Director Román that the lockout was intended to punish the Union is damning,[3] especially in light of the Respondent's additional unlawful conduct. The Respondent had just recently fired a leading union activist, Elsa Romero, because of her union activity and the lockout was followed by the Respondent's unlawful solicitation of employees to decertify the Union.

My colleagues point out that Hospital Administrator Ivan Colón, not Román, actually made the decision to lock out the employees. That may be so, but the circumstances warrant an inference that Román's statement revealed the true basis for the decision. Román was personally involved in the decision-making process, participating in the meetings at which Colón discussed the lockout with the executive board. Moreover, Colón relied on Román to craft the letter to the Union notifying it of the lockout.

Last, it is telling that the Respondent advanced the lockout to the morning of December 22 *after* it learned that the Union had canceled the strike planned for that morning. The cancellation eliminated the Respondent's asserted concern over staffing the two holiday periods. But rather than take advantage of this opportunity to have its regular work force attend to patients—which would have ensured the continuity of patient care—the Respondent decided to take its chances with unfamiliar replacement workers. To my mind, this further confirms that the Respondent's first priority here was not patient care, but retaliating against the Union and the employees.

For all of these reasons, I would affirm the judge's finding that the Respondent's lockout violated Section 8(a)(3) of the Act.

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[2] Contrary to my colleagues' suggestion, I am not arguing that the Respondent had "to take its chances that qualified persons could be found for the erratic work schedule." My argument is simply that the Respondent had to produce some objective evidence—e.g., a consultation with a placement service—to substantiate its self-serving claim that it would have had difficulty staffing the hospital during the separate strike periods. The majority cites the testimony of the Respondent's witnesses, which it describes as "based on their experience." I share the judge's contrasting view, that the testimony reflected "supposition and conjecture."

[3] The majority claims "the testimony is different." It is not. The credited testimony of employee Cintrón is that Román told Cintrón and her coworkers that the lockout was a "reprisal" (meaning "a retaliatory act," Merriam-Webster's Collegiate Dictionary 993 (10th ed. 1999)) against the Union. The credited testimony of employee Reyes too was that Román said the lockout was directed at the Union. Thus, the majority gets it wrong when it says that, because the Union's calling of the strike prompted the lockout, "it was not unreasonable for Román to blame the Union for the lockout." Given Cintrón's and Reyes's credited testimony, it is clear that Román did not "blame the Union for the lockout" in the sense that my colleagues suggest; that is, she did not state that it was a defensive measure necessitated by the Union's actions. Román's statement gave no indication that the Respondent's purported interest in patient care—which the majority mistakenly accepts as true—was the reason for the lockout. Rather, Román's statement made clear to the employees that the lockout was a retaliatory act against the Union for engaging in lawful strike activity. And whatever the Respondent's actual motives, employees could reasonably interpret Román's statement as evidence of unlawful antiunion animus, which is why I would find (contrary to the majority) that the statement independently violated Sec. 8(a)(1).

Dated, Washington, D.C. July 13, 2004

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the ULEES by unilaterally subcontracting bargaining unit work.

WE WILL NOT sponsor, support, and encourage the filing of a decertification petition.

WE WILL NOT discharge employee Elsa Romero or any other employee because of her support for and activities on behalf of ULEES.

WE WILL NOT interfere with our employees' right to engage in protected concerted activities in the nonpatient care areas of our facility by refusing to allow them to distribute ULEES or other union literature in our hospital cafeteria during their nonwork hours, and by sponsoring, supporting, or encouraging them to file a decertification petition.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL discontinue subcontracting bargaining unit work to GK Professional Services and Respicare, and WE WILL notify and, on request, bargain with ULEES over any decision to subcontract out bargaining unit work, and over the effects of such decision on unit employees.

WE WILL, within 14 days from the date of the Board's Order, offer Elsa Romero full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Elsa Romero whole for any loss of earnings and benefits suffered by her as a result of her unlawful discharge, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Elsa Romero, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

SOCIEDAD ESPAÑOLA DE AUXILIO MUTUO Y BENEFICENCIA DE P.R. A/K/A HOSPITAL ESPAÑOL AUXILIO MUTUO DE PUERTO RICO

Ismael Rodriguez, Esq., for the General Counsel.
Julio I. Lugo Muñoz and *Angel Muñoz Noyas, Esqs.*, for the Respondent.
Harold Hopkins, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. A hearing in this matter was held in Hato Rey, Puerto Rico, on October 10–13 and 24–26, 2000, pursuant to various charges filed by Unidad Laboral de Enfermeras (os) y Empleados de la Salud (ULEES or the Union), and issuance of a fifth consolidated amended complaint by the Regional Director for Region 24 of the National Labor Relations Board (the Board) on December 10, 1999, alleging that the Respondent, Sociedad Española de Auxilio Mutuo y Beneficencia de P.R. a/k/a Hospital Español Auxilio Mutuo de Puerto Rico, Inc. (the Respondent or the Hospital), had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

Specifically, the complaint alleges that the Respondent violated Section 8(a)(1) by disparately enforcing since on or about January 1, 1998,[1] a no-solicitation/no-distribution policy against its unionized employees, by telling employees it was locking them out in retaliation for their union activities, and by seeking to have employees decertify the Union. It further alleges that the Respondent violated Section 8(a)(3) and (1) by discharging employee Elsa Romero on October 26 for her union activities, and locking out unit employees from December 22–31, and violated Section 8(a)(5) and (1) by, on or about July 1, 1998, subcontracting out bargaining unit work being performed by its radiology technicians, and subcontracting out on or around December 18, 1998, bargaining unit work performed by its respiratory therapy and operating room technicians, without prior notice to the Union and without affording it an opportunity to bargain over the subcontracting decisions or over the effects of these changes on unit employees.[2] By answer dated December 23, 1999, the Respondent denied engaging in any unlawful conduct.

[1] All dates herein are in 1998, unless otherwise indicated.

[2] The parties stipulated at the hearing that pursuant to a settlement agreement entered into by the parties on September 29, 2000, the following complaint allegations have been settled and, consequently, are not before me for resolution: pars. 10(a)–(b); and 11(a)–(d); the provision in par. 11(e) alleging the unlawful subcontracting of escort employee's services (escoltas) to G.K. Professional Services; par. (g); pars. 12 and 13; and conclusionary par. 18.

All parties at the hearing were afforded full opportunity to call and examine witnesses, to submit oral as well as written evidence,[3] and to argue orally on the record. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Puerto Rico corporation, is a health care institution located in San Juan, Puerto Rico, where it is engaged in the business of providing acute inpatient and outpatient medical and professional care services. During the year preceding issuance of the complaint, a representative period, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $250,000, and purchased and received goods and products valued in excess of $50,000 directly from suppliers located outside the Commonwealth of Puerto Rico. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. The Respondent further admits, and I find, that the ULEES is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. ULEES' representative status

For years, ULEES has been the exclusive certified bargaining representative of Respondent's employees in various bargaining units.[4] Thus, on October 11, 1977, ULEES was certified by the Board as the exclusive bargaining representative of Respondent's registered (graduate) nurses (RNs). On December 15, 1994, a Board election was held in Case 4–RC–7677, among three different groups of employees, identified as units A, B, and C. Following the election, the Respondent filed objections which were finally resolved by the Board on January 15, 1997, resulting in ULEES being certified as the exclusive bargaining representative of employees in unit C (JX-3). On December 31, 1997, ULEES was certified as the exclusive bargaining representative of employees in unit A.[5] Sometime in early to mid-1998, the parties entered into contract negotiations.

2. The subcontracting of unit work

The complaint, as noted, alleges that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union over its decisions to subcontract out unit work regularly performed by X-ray technicians and respiratory therapists. The Respondent claims that its subcontracting decisions were consistent was an established past practice and not unlawful.

The record reflects that the Respondent has longed maintained its own staff of X-ray technicians. The parties stipulated, and documentary evidence shows, that beginning August 1, 1996, and while its objections to the election in Case 4–RC–7677 were still pending before the Board, the Respondent subcontracted a portion of its X-ray technician's unit work to GK Professional Services (IV:554–555; 565–566). The subcontracting agreement, received into evidence as JX-2, shows that the subcontracting agreement between Respondent and GK Professional Services was entered into October 29, 1996, but was effective from August 1, 1996, to July 31, 1997. Under that agreement, the contract X-ray technicians furnished by GK Professional Services were to perform the X-ray services during the midnight or "graveyard" (11 p.m.–7 a.m.) shift, weekends, and holidays. (JX-2.) The parties stipulated that this agreement remained in full force and effect until August 1, 1998, at which time they entered into a new contract for the period August 1, 1998, to December 31, 1999, after which the parties renewed their contract covering a period from January 1 to December 31, 2000. (I:49–50.) The X-ray services during other shifts at the Hospital continued to be provided by Respondent's own X-ray technicians.

The parties also stipulated that on June 30, 1998, the Respondent contracted with Corporacíon de Tecnología Cardio-Pulmonar (CTC), to perform respiratory therapy unit work at the Hospital for a period beginning May 1, 1998,[6] and ending April 30, 1999, and that, on December 18, 1998, it contracted with Respicare to perform the same work from December 18, 1998, to January 30, 1999. On March 28, 2000, it entered into a new agreement with Respicare effective from January 1

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[3] Documents offered into evidence are identified as "GCX" for a General Counsel exhibit, "CPX" for a Charging Party exhibit, or "RX" for a Respondent exhibit, followed by the designated exhibit number. Where translation of documents were required, the original Spanish language document is identified by the letter "(a)" following the exhibit number, and the English translation by the letter "(b)" after the exhibit number. Reference to testimony at the hearing is identified by the transcript volume number followed by the appropriate page or pages.

[4] The Respondent also has a collective-bargaining relationship with the Seafarers International Union (SIU), which represents the Hospital's practical nurses.

[5] Unit A includes the following employees:

> All receptionists, orderlies (escoltas), ward clerks, office clerks, data entry operators, telemetry technicians, dialysis reuse technicians, orthopedic technicians, medical record technicians, supply technicians, registration clerks, EKG technicians, X-ray transcribers, telephone operators, general assistants, utilization messengers, pharmacy cashiers, communications technicians, and cast technicians, all officers in the hemodialysis, emergency room, purchasing, admissions, and utilization departments; and all secretaries in the respiratory therapy, renal transplant, operating room, emergency room, purchasing, social work, medical education, medicine, and utilization departments, employed by the Employer at its hospital located in Hato Rey, Puerto Rico; but excluding, all other employees, physicians, professional employees, registered nurses, licensed practical nurses, nurses' aides, maintenance employees, the office clerks and secretaries in the human resources, administration, payroll, medical faculty, nursing central office, and HMO departments, guards and supervisors as defined in the Act.

Unit C includes the following:

> All technical employees employed by the Employer at its Hospital located at Hato Rey, Puerto Rico, including respiratory therapists, respiratory therapist technicians, angiography technicians, medical emergency technicians, radiology technicians, assistant pharmacists (auxiliar de farmacia), physical therapy assistants, and operating room technicians, excluding all other employees, registered nurses, licensed practical nurses, nurses' aides, maintenance employees, the employees included in unit A and unit B, the office clerks in human resources, administration, payroll, medical faculty, nursing central office, and HMO departments, guards, and supervisors as defined in the Act.

[6] While the CTC contract was retroactive to May 1, the record does not reveal whether the Respondent in fact began subcontracting out respiratory therapy unit work on May 1.

through December 31, 2000. (I:51.) The Respondent admitted by stipulation that it did not notify or afford ULEES an opportunity to bargain over its 1996 decision to subcontract X-ray technician unit work to GK Professional Services, over its June 1998 decision to subcontract respiratory therapy unit work to CTC, and over its December 1998 decision subcontract the same work to Respicare.[7] (I:54–56.)

Notwithstanding the parties' stipulation that the Respondent began subcontracting out some of the bargaining unit work generally performed by X-ray technicians and respiratory therapists in 1996 and 1998, respectively, respiratory care unit manager and, admitted, Supervisor Carmen Martínez testified that the Hospital's practice of subcontracting out respiratory therapy services dated back to before 1982, when she first began working for Respondent. She further claimed that in 1993, while serving as a supervisor in the respiratory care unit, the respiratory therapy work had been contracted to an outside firm for a 6- to 7-month period. (V:667.) Martínez' testimony, above, is found not to be credible as it is inconsistent with the parties' stipulation as to when the subcontracting actually began, and as no evidence, such as copies of prior contractual arrangements, or the alleged 1993 contract alluded to by Martínez, was produced to corroborate the latter's claims. Clearly, if the Respondent had had a practice of subcontracting out the X-ray technicians' unit work prior to 1996, or the respiratory therapists work prior to May 1998, it would have, I am convinced, produced copies of all such agreements or some other credible evidence to support Martínez' above claim, or, at a minimum, provided the identity of the alleged prior subcontractors. The Respondent produced no such evidence. Nor, indeed, did it so much as contend during the course of entering into its stipulations that the agreements entered into with GK Professional Services in 1996, and CTC in June 1998, was consistent with established past practices.

Human Resources Director Maria Román began working for Respondent in June 1998. She testified that her duties at the Hospital included the recruitment and hiring of professional employees, and that the Hospital oftentimes has difficulty recruiting the personnel, more particularly registered nurses, respiratory therapists, physical therapists, and X-ray technicians, needed to adequately staff the facility, and when this occurs the Hospital will often hire per diem or contract employees to meet its demand.[8] She claims that the Hospital had always, even before her arrival in June 1998, used per diem or contract employees to meet its staffing requirements, and that she became aware of this practice from documents she purportedly had access to as human resources director. Román's latter claim finds some support in the record. Thus, Romero's and Martínez' testimony clearly shows that per diem employees were being used as far back as 1993. Román's further claim that the Respondent had been contracting out X-ray and respiratory therapy services before her arrival in June 1998 is also factually accurate, for the contracting out of X-ray technician work, as stated, began in 1996 when Respondent entered into its agreement with GK Professional Services, while the contracting out of respiratory therapy services, under Respondent's agreement with CTC, began in May 1998, before Román began working for Respondent in June 1998. Román, however, never testified to knowing whether the contracting out of X-ray technician and respiratory therapy unit work which she described the Respondent was engaging in prior to her arrival were practices which the Respondent had been following long before it entered into its 1996 agreement with GK Professional Services, and its 1998 agreement with CTC.

Enid Donhert, manager of Respondent's neurology and magnetic resonance department, testified that the Respondent was contracting out the X-ray unit work in July 1996, before entering into the subcontracting agreement with GK Professional Services, and that the Respondent has always used per diem or contract employees to do some of the X-ray technicians' unit work. I place no credence in Donhert's testimony. Thus, her claim that the Respondent had been using per diem or contract employees since at least July 1996, conflicts with the parties' stipulation that the subcontracting of X-ray technicians began in August 1996, under Respondent's agreement with GK Professional Services. Further, her claim that the Respondent has always used per diem or contract employees to do X-ray technician work is simply too ambiguous to be entitled to any weight. Clearly, the Respondent, as discussed, has been subcontracting out X-ray technician unit work since August 1996, under its GK Professional Services contract. Thus, Donhert would not have been wrong if her testimony was intended to reflect what the Respondent has been doing since August 1996. If, however, Donhert intended her remark to mean that the Respondent's practice of using per diem or contract employees had been in existence prior to August 1996, then her claim would be untenable as it would be inconsistent with the parties' stipulation and would, moreover, be devoid of any factual support. Accordingly, I give no weight to Donhert's above testimony.

In sum, I reject as not credible Martínez' testimony that the Hospital's practice of subcontracting out respiratory therapy unit work dates back to 1982, and Donhert's claim that the Respondent was already subcontracting out the X-ray technicians' unit work before entering into its 1996 contract with GK Professional Services. As noted, Román in her testimony makes no such claim. I find, instead, that, as stipulated to by the parties, the practice of subcontracting out respiratory therapy unit work began in 1998, when Respondent contracted with

[7] Included in the stipulation about the Respondent's refusal to notify and bargain with ULEES over its subcontracting decisions was the understanding, conveyed in a January 31, 2000 letter from Respondent's attorney to ULEES Executive Director Radamés Quiñones that the Respondent was henceforth willing negotiate and reach some kind of agreement with the Union. Nothing in that letter negates Respondent's admission that it did not notify or offer to bargain with ULEES over its subcontracting decisions. Further, even if the January 2000 letter can, by some stretch of the imagination, be viewed as expressing a willingness on the Respondent's part to bargain over its subcontracting decisions, it would not alter the fact that the Respondent never notified or bargained with ULEES about its 1996 and 1998 subcontracting decisions. A willingness to talk about such decisions after their unilateral implementation amounts to nothing more than a fait accompli and does not equate to bargaining over such decisions. *Puerto Rico Telephone Co.*, 149 NLRB 950, 964 (1964).

[8] The evidence does show that the Respondent had been hiring per diem employees to do respiratory therapy work prior to May 1998. Thus, alleged discriminatee Elsa Romero testified that she began working as a per diem respiratory therapist in 1993, and subsequently became a full-time staff employee in 1995. Martínez testified in similar fashion regarding Romero's employment history. (V:670–671.). Romero's and Martínez' testimony, however, suggest that Romero was hired directly as a per diem employee through her own efforts, and not pursuant to some contractual arrangement the Respondent may have had with an outside firm.

CTC to provide such services beginning May 1998, and that the practice of contracting out the X-ray technician unit work began in August 1996, when the Respondent first contracted with GK Professional Services.

Discussion

In support of the refusal-to-bargain allegation, the General Counsel argues that the Respondent's decisions to subcontract out the X-ray technicians' and respiratory therapists' unit work were mandatory subjects of bargaining requiring the Respondent to first notify the Union and afford it an opportunity to bargain over the decisions before implementing them. I agree.

An employer's obligation to bargain arises on the date a majority of employees in a bargaining unit selects the union as their representative. *Gulf States Mfrs.*, 261 NLRB 852, 863 (1982). Here, a majority of the Respondent's employees in units A and C expressed their support for ULEES in the election conducted by the Board in December 1994. Although the Respondent thereafter filed objections to the election, the Board has held that, absent compelling economic considerations for doing so, an employer acts as its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made.[9] See, e.g., *Flambeau Airmold Corp.*, 334 NLRB 165 (2001); *Ebenezer Rail Car Services*, 333 NLRB 167, 172 (2001); and *Kentucky Fried Chicken*, 278 NLRB 576, 579 (1986), citing *Mike O'Connor Chevrolet Co.*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

Here, the Respondent, unilaterally by its own admission, and while its election objections were still pending before the Board, first began subcontracting out bargaining unit work in 1996, when it contracted with GK Professional Services for X-ray technicians, and in 1998, when it renewed its contract with GK Professional Services, and then began subcontracting out respiratory therapy unit work first to CTC, and then Respicare.[10] An employer's decision to subcontract out bargaining unit work is a mandatory subject over which it must bargain if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope and direction of the enterprise. *Torrington Industries*, 307 NLRB 809 (1992); see also *Overnite Transportation Co.*, 330 NLRB 1275 (2000); *Acme Die Casting*, 315 NLRB 202 (1994). The Respondent does not contend, nor is there any evidence to show, that the above subcontracting decisions involved, or resulted in, a change in the nature, scope, or direction of its operations. Rather, the Respondent claims only that its subcontracting decisions were prompted solely by its inability to recruit and hire the X-ray technicians and respiratory therapists needed to meet its staffing requirements. Accordingly, the Respondent's 1996 and 1998 subcontracting decisions were mandatory subjects of bargaining.

The Respondent, I find, has not demonstrated that it had compelling economic reasons for its unilateral subcontracting decisions. The only evidence of a possible economic motive cited by Respondent in support of its subcontracting decisions is Román's testimony that on becoming human resources director, she became aware that the Respondent was using per diem and contract X-ray technicians and respiratory therapists to help staff its facility because a general industry-wide shortage of such personnel made recruitment and hiring of X-ray technicians and respiratory therapists difficult. While Román did so testify, she never stated that this purported inability to meet its regular hiring demands was the motivating factor behind the Respondent's 1996 and 1998 decisions to begin subcontracting out bargaining unit work. Nor, for that matter, did she claim to know what, if anything, may have prompted the Respondent to enter into a subcontracting agreement in 1996 with GK Professional Services, or into a similar subcontracting arrangement in 1998 first with CTC, and then with Respicare. In fact, the one person who could have testified as to the underlying reasons for the subcontracting decisions was Colón, whose name appears on the 1996 GK Professional Services and 1998 Respicare contracts as the Hospital's representative.[11] However, while he testified as to other matters, Colón was never questioned about and, consequently, provided no clue as to why the Respondent began subcontracting out X-ray technician unit work in 1996, and respiratory therapy unit work in 1998. Accordingly, the record fails to show that the Respondent's subcontracting decisions were motivated by compelling economic considerations.

The Respondent, however, contends that under *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965), its subcontracting of X-ray technician unit work to GK Professional Services beginning in 1996, and renewed in August 1998, and its May 1998 subcontracting of respiratory therapy unit work to CTC, and subsequently to Respicare in December 1998, was privileged because they were consistent with a "pre-existing practice and did not result in a significant detriment to the employees in the bargaining unit." (RB:35.) Its contention is without merit. Under *Westinghouse*, supra, an employer's failure to notify and bargain with a union over a decision to subcontract out bargaining unit work (or to assign such work to nonunit employees) does not violate Section 8(a)(5) and (1) if the employer can show that its decision (1) was motivated solely by economic considerations, (2) comported with its customary business operations, (3) did not vary significantly in kind or degree from an established past practice, (4) had no demonstrable adverse impact on unit employees, and (5) was preceded by the union's having an opportunity to bargain over the decision. The Respondent has not met that burden here.

Thus, the Respondent, as previously discussed, has not shown that its 1996 and 1998 decisions to partially subcontract out unit work performed by X-ray technicians and respiratory therapists were motivated solely by economic considerations. Nor has it produced any credible evidence to show that its 1996 and 1998 subcontracting decisions were consistent with its customary business operations and a mere continuation of past

[9] Where the final determination of the objections results in the certification of a representative, the Board has held the employer to have violated Sec. 8(a)(5) and (1) for having made such unilateral changes. *Mike O'Connor Chevrolet Co*., supra, at 703. Such changes, the Board explained in *Mike O'Connor Chevrolet*, have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending.

[10] Its 1998 subcontracting decisions, as noted, occurred after Board had dismissed the Respondent's objections to the election and certified ULEES as the exclusive bargaining representative of Respondent's employees in units A and C.

[11] The CTC agreement was not produced at the hearing.

practices. The only evidence of a past practice is Martínez' discredited claim that the Respondent, since at least 1982, has been contracting out respiratory therapy unit work. As to the subcontracting of X-ray technician work, no claim, credible or otherwise, was made by Martínez, or by any other witness for that matter, that the Respondent was subcontracting out the X-ray technicians unit work prior to 1996. Further, the Respondent, as noted, admitted that it never notified or bargained with ULEES over its 1996 and 1998 subcontracting decisions before implementing them. Finally, that its subcontracting of unit work may not have resulted "in a significant detriment to the employees in the bargaining unit," as claimed by the Respondent on brief (RB:35), does not render its actions lawful, for the Board has held that an employer must bargain over a decision to subcontract out unit work even when the decision will have no discernible impact on bargaining unit employees. *Suffield Academy*, 336 NLRB, supra at 1276; *Overnight Transportation Co.*, 330 NLRB 659, 672 (2000). Thus, assuming, arguendo, that its decisions may not have adversely impacted on unit employees, the Respondent was nevertheless not at liberty to bypass their collective-bargaining representative and to unilaterally implement said decisions. For these reasons, the Board's *Westinghouse* decision is found not to be controlling here.

Accordingly, having failed to show that it had a compelling economic reason for its 1998 unilateral decisions to subcontract out the X-ray technicians unit work to GK Professional Services,[12] and respiratory therapy unit work first to CTC, and then to Respicare, without giving ULEES prior notice of and an opportunity to bargain over the decisions and their effect on unit employees, the Respondent, I find, violated Section 8(a)(5) and (1) of the Act, as alleged.[13]

3. The restriction on solicitation

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act when, on February, 13,[14] it enforced its no-solicitation/no-distribution rule[15] against employee Ana Consuelo Melendez by prohibiting her from distributing union literature in its cafeteria. While not questioning the facial validity of the rule, the General Counsel does contend that rule 28 was disparately applied to prohibit union activities while allowing nonunion activity to occur. Support for the General Counsel's position came primarily from Melendez who, at the time of the hearing, held the position of union president.

Melendez has been employed by Respondent for 25 years. She testified that in February 1998, as she entered the hospital cafeteria to take her lunchbreak, she met up with ULEES Representative Jose Quiñones, who was distributing union literature to other employees in the cafeteria.[16] Melendez claims that as she began assisting Quinones with his solicitation and distribution activities, a hospital security guard intervened and prevented them from continuing their activities. On February 25, the Respondent issued Melendez a letter, signed by Associate Administrator Sonia Jiménez, advising her that her February 13, behavior had violated rule 15 of its rules of conduct. (See RX-6b.)[17] Specifically, the letter states that according to the information received by the Hospital, Melendez was on working hours when she "interfered with the security officers in the cafeteria and forced the ULEES representative" to return to the cafeteria. It further states that her conduct during this incident demonstrated a "lack of courtesy and consideration towards the patients, employees, supervisors, and visitors to the institution who were in the cafeteria, and that her behavior in raising her voice and addressing supervisors in an "inappropriate manner" was not the type of behavior which Hospital employees should be reflecting. Notwithstanding what is stated in the letter, Melendez believes she was issued the warning letter because of

[12] With respect to the subcontracting of X-ray technician unit work, the complaint alleges only the Respondent's August, 1998 decision with GK Professional Services to be unlawful, not its 1996 decision. See complaint par. 11(e), as amended at the hearing (GCX-1[hhh]; I:19).

[13] The Respondent's motion to dismiss as untimely under Sec. 10(b), the complaint allegation that its subcontracting of unit work to Respicare in December 1998, violated Sec. 8(a)(5) and (1), is denied. (See RX-3.) While, as argued by the Respondent, no specific charge was filed in this case alleging the December 1998 subcontracting of unit work to Respicare to be unlawful, this allegation is, in my view, "closely related" to the timely-filed charge in Case 24–CA–8181 alleging that the Respondent's subcontracting of unit work to GK Professional Services is unlawful. *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), and *Redd-I, Inc.*, 290 NLRB 1115 (1988). Thus, both allegations involve the same section of the Act, e.g., Sec. 8(a)(5) and (1), and the same legal theory and conduct, e.g., refusal to bargain over the mandatory subject of subcontracting out of unit work. Further, the Respondent's defense to the Respicare allegation was the same as that raised with respect to the timely filed allegation, e.g., that its subcontracting was consistent with a past practice and lawful under *Westinghouse*, supra. For these reasons, I find that under the "closely related" test set forth in *Nickles Bakery* and *Redd-I*, supra, the allegation of unlawful subcontracting in the timely filed charge in Case 24–CA–8181 is sufficient to support the complaint allegation that the subcontracting of unit work to Respicare was unlawful.

[14] A warning issued to Melendez on February 25, indicates that the incident occurred on February 13. (See RX-5b.)

[15] The no-solicitation/no-distribution rule, known as rule 28 (see (JX-10b), reads as follows:

> It is not permitted that employees solicit from another employee, patient, or visitor, at any time, either during or after his or her work hours, any funds or membership for any kind of organization or buy or engage themselves in the sale of goods and services and/or distribute literature in areas strictly dedicated to the care of patients. An area strictly used for the care of patients is defined as their rooms or any other place where they receive any kind of treatment, any hallways adjacent to said areas, the reception places of the patients' floors that are used by them, and elevators and stairs that are frequently utilized to transport patients. In those areas that are not strictly for care of patients, the employees cannot solicit funds or membership for any kind of organization, or distribute literature of any kind during their working hours. The term "working hours" does not include authorized rest periods, such as the time to have meals or of short duration, for snacks (coffeebreak)."

The General Counsel took conflicting positions regarding the facial validity of rule 28. Thus, the rule itself was not alleged in the complaint to be unlawful on its face. Rather, the complaint alleges only that it was disparately applied and enforced against Melendez. Yet, at the hearing, the General Counsel asserted, for the first time and after having completed presentation of his case, that rule 28 is overly broad and presumptively unlawful (IV:547). I make no finding regarding the facial validity of the rule as the General Counsel never sought to amend the complaint to include such an allegation, nor did he move to have the pleadings amended to conform to the proof presented in the case.

[16] Melendez initially described Quiñones as a "fellow worker" during direct examination. However, she subsequently admitted on cross-examination that Quiñones was not an employee of the Hospital. (Tr. 380; 425.)

[17] Rule 15 contains four separate provisions. The letter does not cite which of the four provisions Melendez is alleged to have violated.

her solicitation and distribution activities on behalf of ULEES.[18]

Except for the February 25 letter, the Respondent produced no oral or other documentary evidence to contradict Melendez' version of events, or to substantiate the assertions contained in the letter. Jiménez, who issued the warning letter, was not called to testify. It is therefore not known if Jiménez witnessed the incident herself, or if the assertions made by Jiménez in the letter were based on other third-party information.[19] Similarly, none of the "security officers" mentioned in the letter as having been involved in the incident testified, nor did any of the unnamed supervisors who, according to the letter, were purportedly treated in "an inappropriate manner" by Melendez that day. Further, the Respondent did not produce any evidence, such as a timecard,[20] to corroborate the claim made by Jiménez in the February 25 letter that Melendez' February 13 activities occurred during "working hours," and not, as averred by Melendez, during her lunchbreak. In short, the Respondent here, as in the arbitration proceeding before the Puerto Rico Department of Labor, produced no evidence to support its claim that Melendez engaged in any misconduct on February 13, to justify the warning. Rather, according to Melendez, whose testimony I credit, the only conduct engaged in by her on February 13, and which she further credibly testified Hospital security guards prevented her from doing, consisted of distributing ULEES literature in the Hospital cafeteria during her lunch hour, conduct which the Respondent readily concedes was permitted under its rules.[21] The Respondent here has not shown, nor so much as contended, that its interference with Melendez' distribution activity in what clearly is a nonpatient care area of the Hospital was necessary to prevent a disruption in patient care. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). Accordingly, I find that the Respondent violated Section 8(a)(1) when, on February 13, its security guards prevented Melendez from distributing ULEES literature in its cafeteria during her lunch hour.

[18] The issuance of the February 25 warning letter is not alleged as a violation in the complaint. Melendez, however, testified, and documents introduced into evidence as CPX-8 show, that the warning issued to her was the subject of an arbitration proceeding before Puerto Rico's Department of Labor's Bureau of Conciliation and Arbitration which found, on the basis of Respondent's failure to produce any evidence in support of the warning, that the warning had been unjustifiably issued, and directed its expungement from Melendez' personnel file. (see secs. III, 35; CPX-8b).

[19] Jiménez' reference in her letter to "the information offered to us" suggests that Jiménez did not have first-hand knowledge of what occurred in the cafeteria on February 13. Further, there is nothing in Melendez' testimony or elsewhere in the record to indicate that Jiménez afforded Melendez an opportunity to present her side of the story before issuing her the written warning.

[20] The reference in the letter to Melendez' failure to *"punch* out to take [her] half (1/2) hour meal break" (emphsis added) suggests that employees may have been required to clock in and out when taking their lunchbreak.

[21] The Respondent's assertion on brief that only Quiñones, and not Melendez, was prevented from distributing literature in the Hospital cafeteria on February 13, ignores Melendez' credited and uncontradicted testimony that she too was engaged in such activity when directed by a Hospital security guard to cease her activities. Its claim, therefore, that the General Counsel has not presented evidence to show that it "had enforced a no-solicitation rule against any employee of the Hospital" is rejected as without merit. (See RB:39.)

4. The decertification attempts

The complaint, as noted, alleges that the Respondent unlawfully solicited employees to decertify the Union. The General Counsel contends that two such incidents occurred, one involving Respondent's former communications department manager, Blanca Hernández,[22] the other, admitted supervisor, Evelyn Soto. As to the Hernández incident, part-time switchboard operator Barbara Feliciano testified that sometime between January and April 1999, she went to the Hospital to pick up her paycheck and, on entering the switchboard area, heard Hernández explaining to employees the procedure for decertifying ULEES. She recalls Hernández telling employees how to collect signatures, that they should sign such a petition because they had lost benefits, that the communications department had been pro-administration, and that while the Hospital administrator had promised the operators salary increases, the Hospital now would not be able to give them raises because they had become unionized. Feliciano claims that after her meeting with employees, Hernández called Feliciano to her office and asked her to sign a paper which contained the signatures of other employees, including that of employee Evelyn Colón, the only name she was able to recall. Feliciano refused to sign because the document did not explain what it was to be used for.

Hernández denied ever meeting with Feliciano, or asking her to sign a decertification petition (VII:1053.). She was not, however, specifically asked to confirm or deny Feliciano's further assertion that she, Hernández, instructed employees at some point between January and April 1999, presumably before she retired, on how to collect signatures purportedly for decertification and encouraged them to sign a decertification petition. Hernández testified only that she did hold monthly meetings with employees and recalled two employee meetings in December 1998, and that at the first meeting she simply informed employees that ULEES had called a strike, and at the second notified them of a lockout imposed by the Hospital.

I credit Feliciano over Hernández. Although unable to be more precise as to date or month Hernández made her remarks, I am convinced from her sound demeanor on the witness stand that Feliciano was telling the truth as to what she heard and observed Hernández tell employees about decertifying the Union.[23] Hernández, on the other hand, was not very convincing. Hernández, it should be noted, did not specifically deny having had any such discussion with employees. Further, while she claims to have held only two meetings with employees which occurred in December 1998, she also testified that she held monthly meetings with employees, making clear that she would have met with employees during January through April 1999, and leading me to believe, as testified to by Feliciano, that it was during one of these monthly meetings that Hernández made her decertification remarks to employees.

As to the second incident, Sally Rodriguez, formerly employed by Respondent as administrative assistant in the emergency room,[24] testified that in early January 1999, she was given a flyer by Emergency Room Coordinator, Evelyn Soto,

[22] Hernández retired in April 1999.

[23] Feliciano was still employed by Respondent when she testified at the hearing, making her testimony that much more reliable. *Mr. Z's Food Mart*, 325 NLRB 871, 888 (1998).

[24] Rodriguez left Respondent's employ in August 1999.

an admitted supervisor,[25] describing the benefits employees had before and after the Union was certified, and stating that if employees "do not want to continue putting your benefits at risk, add your signature to the lists to decertify ULEES. If we continue with ULEES in 1999, we will loose [sic] everything." (GCX-4) Rodriguez further recalls seeing Soto give the same flyer to employee Luis Zena later that same day. (I:98.)

Soto had been an admissions officer for nine years before being made supervisor in December 1998. Although she never expressly denied giving Rodriguez a copy of GCX-4, she did so implicitly when, on direct examination by Respondent's counsel, she asserted that the first time she saw a copy of GCX-4 was when it was shown to her by Respondent's counsel the night before she was to testify at the hearing, and denied having seen it at any time prior thereto. Her denial in this regard, however, proved hollow for on cross-examination, Soto reluctantly admitted she had been shown a copy of GCX-4 on June 14, 1999, while giving an affidavit to the Board. While it is quite possible that Soto may have forgotten that she had seen GCX-4 prior to the date it was shown to her by Respondent's counsel, from my observation of her demeanor, I am convinced that this was more than a mere lapse of memory. Rather, I believe that Soto, who struck me as being somewhat evasive and uncooperative during examination by the General Counsel and the Charging Party counsel, was simply not being truthful about what she knew of GCX-4. In sum, I reject her claim and find that she in fact gave Rodriguez and employee Zena a copy of GCX-4 which encouraged employees to sign a decertification petition.

In *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985), the Board held that it is unlawful for an employer to initiate a decertification petition, solicit signatures for the petition, or lend more than minimal support and approval to the securing of signatures and the filing of the petition. The Board further noted that while an employer does not violate the Act by rendering what has been termed "ministerial aid" to employees engaged in decertification efforts, its actions must occur in a "situational context free of coercive conduct." Here, it is unclear from Feliciano's testimony just how the subject of decertifying the Union was raised at the meeting Hernández was having with employees when Feliciano appeared. Thus, Feliciano, as noted, testified only to walking in during the meeting and overhearing Hernández making her remarks. It is therefore not known if Hernández' instructions to employees on how to decertify a Union came in response to employee inquiries, or whether Hernández first raised the subject as part of her meeting's agenda. Yet, Soto's unsolicited distribution of a flyer to Rodriguez and Zena, urging them to add their names to the ULEES decertification petition if they did not want "to continue putting [their] benefits at risk," leads me to believe that whatever decertification drive may have been occurring at the time was being instigated by the Respondent, and that Hernández' comments on how to decertify the Union during her meeting with employees was, like Soto's actions, part and parcel of Respondent's overall scheme to undermine the Union and encourage its decertification by unit employees.

However, even if I were to believe, which I do not, that Hernández was simply responding to employee questions on decertification procedures, she clearly went beyond merely providing "ministerial aid" when, by Feliciano's credited account, she urged and encouraged employees at the meeting, and subsequently Feliciano herself, to sign a decertification petition.[26] Further, Hernández' remarks, as noted, were not made in a "situational context free of coercive conduct," for her comment about employees not getting the raises promised to them because they had become unionized, was clearly coercive and intended, I find, to cause employee disaffection with the union and to thereby garner employee support for the decertification drive. I therefore find that the Respondent, through Hernández and Soto did, in fact, unlawfully encourage and assist in the circulation of a petition to decertify the Union and, in doing so, violated Section 8(a)(1) of the Act. See, e.g., *Wire Products Mfg. Corp.*, 326 NLRB 625, 626 (1998); *Silver Spur Casino*, 270 NLRB 1061, 1071 (1984).

5. The discharge of Elsa Romero

Romero, as previously noted, began working for Respondent as a per diem respiratory therapist in 1993, became a regular full-time employee in 1995, and was terminated on October 26. It is undisputed that Romero was an active union member and supporter. She testified that she served as a union delegate with duties that included listening to and addressing employee concerns, advising employees of union-related matters such as work stoppages, and posting union notices at union-designated bulletin boards. She also served on the Union's bargaining committees for units A and C. In December 1997, Romero received a near "Outstanding" (e.g., 3.9 out of a possible 4.0) rating in her overall performance for the period January through December 1997. (GCX-9).

Romero testified that in late summer 1998, while the parties were engaged in contract negotiations, the Union engaged in two separate work stoppages. She claims to have had several conversations with her supervisor, Martínez, regarding the Union during or after those stoppages. Romero testified, without contradiction, that during an August work stoppage, Martínez approached her, asked how things were going with the negotiations, and then commented that if Romero "continued with the Union and the negotiations, she would have troubles because the Union had not achieved much despite the lengthy negotiations." On another occasion again following a work stoppage, Martínez, according to Romero's uncontradicted testimony, told Romero that she was exposing herself too much by talking to the press and having her picture taken and displayed in local newspapers. Romero explained that whenever the Union engaged in a picketing or a work stoppage, the press would show up and she would be interviewed and have her picture taken. Romero responded to Martínez that she and the Union used the publicity in the press to obtain better benefits, noting that the Union's attempt to achieve its goal through Martínez the Hospital had not been successful.

On October 18, Romero reported to work for her usual 3–11 p.m. and was given a work schedule showing her assigned to

[25] Soto had been admissions officer for 9 years before being promoted to supervisor in December 1998. While serving as admission officer, Soto would have been a member of bargaining unit A since at least 1997. She claims, however, that she did not learn that the Union represented her until after she became a supervisor. I found her testimony in this regard not believable.

[26] Although Feliciano testified that she did not know what the document Hernandez asked her to sign would be used for, it is reasonable to infer, given that it was shown to her right after Hernandez' meeting with employees, and that it already contained numerous signatures on it, that the document was in fact the decertification petition Hernandez had been discussing with employees moments earlier.

provide respiratory therapy services at the emergency pediatric and skilled nursing units.[27] Because she was assigned to handle emergency treatments, Romero was given a pager to carry around with her. Soon after beginning her rounds, Romero was paged by Supervisor Ruiz. On returning Ruiz' page, the latter asked Romero to help her out with other patients because she did not have sufficient respiratory therapists on duty to handle all the work. Romero informed Ruiz that she could not leave the area just then, but Ruiz authorized her to do so and told her to go back to the respiratory care department to assess which therapists were available to handle additional assignments. Ruiz also mentioned to Romero that she had tried unsuccessfully to contact Nuñez, Aguilú, or Martínez to discuss the problem, and asked Romero and Rosa if they had contacted any of these individuals. Romero and Rosa, according to the former, responded that they both had tried but had also been unable to reach them. Romero claims she then got together with the other therapists, including Janice Martínez (J. Martínez), and agreed to divide up and treat the patients who were listed in the "standby" category. She testified that she agreed to treat the "standby" patients in rooms 272 through 355, and that J. Martínez agreed to treat six or seven "standby" patients on the seventh floor. (II:284; 286.) Neither Rosa, J. Martínez, nor any of the other therapists on duty that day were called to testify, leaving Romero's above testimony, including her claim that J. Martínez was assigned six or seven "standby" patients on the seventh floor, uncontradicted.

Romero testified that she kept a record of all the patients, along with the type and number of treatments provided to each patient, in a document known as a work assignment sheet (GCX-7). She explained that the practice generally followed by respiratory therapists in treating patients, and which she followed with patients Velasquez and Lopez, is to first read the instructions left by the attending physician in the patient's record on the type of treatment to be provided, which record is kept at the nurses' station. Once she reads the instructions, she goes to the patient's room, administers the treatment, then returns to the nurses' station and records her name and the nature of the treatment provided in a document entitled Respiratory Therapy Care Notes. According to Romero, two of the patients on the standby list which she treated were Carmen Velasquez and Maritza Lopez, both of whom shared room 292.[28] Regarding patient Velasquez, Romero testified she recorded the treatment provided this patient in the respiratory therapy care notes used by the therapist who treated Velasquez during the October 17 midnight (11 p.m.–7 a.m.) shift, and not in the respiratory therapy care notes that would have regularly been used during October 18 evening shift. Romero explained that therapists were not required to record their therapy notes in chronological order, a claim largely corroborated by Martínez who admitted that while the ideal situation is to have the entries recorded in chronological order, this in fact does not occur.[29] As to Lopez, Romero claims she recorded the therapy she gave the latter on a separate blank progress note sheet in the patient's file, a practice Martínez' acknowledges was not at all unusual.[30] (II:225, 228, 230; V:746.)

On October 21, Martínez received a report from supervisor Ruiz regarding the shortage of respiratory therapists during the October 18, 3–11 p.m. shift. The report noted that the staffing shortage had resulted in certain patients on the fourth and seventh floor not receiving respiratory therapy treatments, and stated that both patients and family members had complained about the problem. Attached to the report was a copy of each therapists' work assignment sheet for the October 11, 3–11 p.m. shift listing the name and room number of the patients seen and the treatment provided. Martínez claims that on re-

[27] Work assignments were usually prepared by shift coordinator, María Nuñez. However, Romero testified, without contradiction, that the therapists' work schedule for the 3–11 p.m., October 18 shift was prepared by another employee therapist, Esther Rosa. She explained that during weekends, the department manager or supervisor assigns a particular individual to serve as coordinator. A copy of the assignment sheet showing the distribution of work for therapists during the 3–11 p.m. shift on October 18, was received into evidence as GCX-6. GCX-6 lists the names of the respiratory therapists that were available that day and the patients they were assigned to treat by room number. Because the number of patients who were to receive treatment during that shift far exceeded the number of respiratory therapists available, Rosa placed many of the patients in a "standby" category, meaning that no specific therapist had been assigned to them.

[28] Room 292 was divided into two, with patient Lopez in what was known as room 292-1, and Velasquez in room 292-2. Velasquez, the record reflects, was scheduled to receive respiratory therapy treatment every 8 hours, while Lopez was scheduled for treatment every 4 hours.

[29] GCX-11 appears to corroborate Romero's testimony that the entries made by therapists in the respiratory therapy care notes do not necessarily follow any chronological order, for of the two treatments shown on GCX-11 as having been provided to patient Velasquez during the October 18, 3–11 p.m. shift, the later one, provided by therapist Georgina Arroyo at 9:30 p.m. to patient Lopez, is listed as the first entry on the document, while an earlier treatment purportedly provided at 5 p.m. appears second, after the Arroyo entry. It is worth noting that when shown the entry made by Arroyo, Martínez claimed that Arroyo's entry was wrong because Arroyo worked a 7 a.m.–3 p.m. shift and, therefore, could not have treated Lopez at 9:45 p.m. (see RX-19; V:737). Arroyo was not called to testify. Consequently, it is not known if, as claimed by Martinez, Arroyo worked the 7 a.m.–3 p.m. shift, or whether her entry as to when she provided the treatment to Lopez is accurate. Given Martinez' lack of credibility in other matters, I view her testimony in this regard with great skepticism. In any event, Martínez' insistence that Arroyo incorrectly recorded her treatment of patient Lopez in the respiratory therapy notes in the latter's medical file lends credence and support to Romero's claim that she, like other respiratory therapists often do not record the treatments provided to patients in chronological order.

[30] The respiratory therapy care notes were subpoenaed by the General Counsel prior to hearing. However, during the General Counsel's direct examination of Romero, it was learned that the respiratory therapy care notes for the October 17, 11 p.m.–7 a.m. shift were not included in the documents provided to the General Counsel. While the Respondent seemed willing to stipulate that the October 17 midnight shift respiratory care notes were missing from the documents provided in response to the subpoena, it offered no explanation for their absence. Its contention, therefore, on p. 26 of its brief, that "the Hospital's official record . . . shows that there is no respiratory therapy entry for the 11 p.m.–7 a.m. shift" is wrong and patently misleading given its admission that the respiratory therapy notes for October 17, 11 p.m.–7 a.m. shift were never produced. The Respondent's attempt to support its claim in this regard by referencing exhibits GCX-10 and GCX-11 is likewise misplaced, for GCX-10 only contains the respiratory entries made on October 14, and GCX-11 reflects therapies provided to patient Velasquez during the October 18, 3–11 p.m. shift. Neither exhibit contains entries for the October 17, 11 p.m.–7 a.m. shift. Thus, contrary to the Respondent, neither GCX-10 nor GCX-11 refutes Romero's claim of where she recorded the entries for Velasquez on October 18. Further, patient Lopez' file was also not produced at the hearing. Consequently, Romero's claim that she recorded her October 18 treatments of patient Lopez on a blank respiratory therapy care note sheet has likewise not been refuted.

viewing the work assignment sheets, she noticed that patients Lopez and Velasquez of room 292, were shown in Romero's and J. Martínez' work assignment sheets as having been treated by both. (See GCX-7 and RX-14). Doubting that both would have provided services to the same patients during the same shift, Martínez questioned Romero and allegedly J. Martínez separately about the duplicate entries.

Martínez testified she asked Romero about the entry, and that the latter stated that if her production report showed she treated the patients in room 292, then she must have done so. Romero recalls Martínez asking her about the entry, but provided a slightly different version of their conversation. Thus, she testified that when summoned to her office, Martínez accused her of billing for respiratory therapy services she did not provide to patient Lopez. Romero denied the accusation and insisted that she did in fact treat Lopez. (II:216.) Romero also recalls Martínez asking her about the report she received from Supervisor Ruiz that same day about the inadequate staffing of respiratory therapists during the 3–11 p.m. shift on October 18. (RX-13.) Romero claims she told Martínez that she had asked Ruiz to prepare the memo so as to call attention to the staffing shortage problem. (II:232.) Martínez denied that any discussion about the origins of the report took place.

After speaking with Romero, Martínez purportedly questioned J. Martínez about the entry in her record, and claims that the latter stated she had treated both room 292 patients on the day in question, and suggested that Martínez review the clinical files of both patients to confirm her claim. Martínez purportedly called and left a message for clinical supervisor José Aguilú to check the clinical files in question. Aguilú, according to Martínez, reviewed the files the next day and then informed her that the files showed J. Martínez had treated patients Velasquez and Lopez. Neither Aguilú nor J. Martínez were called to testify.

On receiving Aguilú's report, Martínez purportedly checked the clinical files herself to see if maybe the patients' attending physicians had ordered additional treatments which might account for the duplicate entries. Finding none, Martínez claims she then reviewed the October 18 respiratory therapy care notes for patients Velasquez and Lopez and found entries purportedly made by J. Martínez reflecting treatments given by her to both patients at 5 p.m. that evening. (See RX-20, p. 2, and GCX-11.) Martínez next went to the billing office and obtained from MIS analyst Miguel Cepeda a computer printout showing that Romero and J. Martínez had each billed separately for providing treatment to Velasquez and Lopez on the same date.

According to Martínez, she again went to Romero and asked which of the two, she or J. Martínez, had treated the room 292 patients on October 18, and Romero reiterated that she had done so. Nothing in Martínez' testimony suggests that she ever asked Romero to show her where in the respiratory therapy care notes she may have recorded the therapies provided to patients Velasquez and Lopez, or that Martínez reviewed the respiratory therapy care notes for shifts other than the October 18 evening shift to see if, as was apparently the practice among therapists, Romero's purported treatment entries for Velasquez and Lopez had been recorded elsewhere.

Martínez claims that on October 22 she received a report about an incident which occurred in the pediatrics department between Romero and registered nurse Marta Galindez wherein the latter complained that Romero had exhibited a "hostile and very inappropriate" attitude towards her, and other members of the nursing and secretarial staff. (RX-22.) She claims she received yet another complaint from shift coordinator María Nuñez that Romero had been "hostile and aggressive" towards three other workers in the presence of a patient, and that she, Nuñez, could not tolerate Romero's workplace behavior. (RX-23; V:755.) Martínez then purportedly reviewed Romero's personnel file and found that Romero had been written up in the past for other alleged misconduct. She claims she then wrote up a report explaining what she had found in Romero's file and detailing the events of October 18, and the reports received from Galindez and Nuñez, and sent it to Román.[31] (RX-25.)

On October 26, according to Martínez, she, Román, and Aguilú met to discuss the incidents described in her report and after reviewing it, she and Román agreed to terminate Romero. Martínez then prepared a discharge letter setting forth the reasons for Romero's discharge. (GCX-8.) Included as reasons for the discharge are Romero's alleged billing on October 18, for respiratory therapy services she did not render, and because of conduct and attitude problems exhibited by her as evidenced by the Galindez and Nuñez reports. In further support of the discharge, the report makes reference to the fact that Romero had previously been suspended in 1997 for 4 months for "dishonest" behavior for permitting another employee to clock in for her when she was not reporting for work. Another incident Martínez admits relying on to support the discharge was a November 6, 1997 report prepared by nurse Galindez wherein the latter accused Romero of having a "hostile and negative" attitude. (RX-31b; V:795-796.)

Martínez claims that on October 26, she met with Romero, handed her the discharge letter along with the Galindez and Nuñez reports which she asked, but which Romero refused, to sign. Martínez admits that while the Galindez and Nuñez reports factored into the decision to terminate Romero, at no time prior to her October 26, discharge was Romero questioned about or confronted with the allegations contained in said reports. (VI:873-875.) As to the Nuñez complaint, Martínez never claimed to have questioned or interviewed any of the three unknown workers with whom, according to Nuñez, Romero had been purportedly been "hostile and aggressive." In fact, Martínez readily admitted that her conclusion, that the allegations about Romero's alleged "hostile" behavior stated in the Galindez and Nuñez reports were true, was based solely on Galindez' and Nuñez' version of events, and not on any independent investigation conducted by her, and on the fact that Romero had had similar allegations lodged against her in the past.[32] (VI:877.) Román, who testified on other matters, was not asked about her involvement in Romero's discharge.

[31] The report prepared by Martínez contains "August 25" as the date it was written. Martínez, however, testified that this was an error and that the report was actually prepared in October, not August.

[32] Martínez' failure to properly investigate the Galindez and Nuñez complaints contravened Hospital rules. Thus, during cross-examination by Charging Party's counsel, Martínez stated that Hospital rules require that a full investigation be made of an incident before a decision to discharge an employee is made. (VI:919.) Although Martínez claims to have done so in Romero's case, the facts, including her own testimony, reveal otherwise. Thus, Martínez admits she never questioned Romero about the incidents set forth in the Galindez and Nuñez, nor, as noted, did she question the recipients' of Romero's alleged "hostile and aggressive" behavior as claimed in the Nuñez report. Instead, by her own admission, she relied only on the contents of reports themselves to conclude that Romero was guilty of the alleged misconduct and as a basis for the discharge. (VI:876-877.) Martínez sought to justify her

Romero provided a different version of her discharge. She testified that on arriving to work for her usual 3–11 p.m. shift on October 26, she did not find her name on the work assignment roster and questioned Aguilú about it. When she jokingly asked if she was being fired again, apparently referring to her 1997, 4-month suspension, Aguilú replied somewhat nervously, "No, No," and proceeded to add Romero's name to the roster. Around 6 p.m., Romero was called to the human resources office by Supervisor Nuñez. Before meeting with Nuñez, Romero asked coworker, Fernando Casanova, to accompany her and he agreed to do so. When Romero and Casanova arrived at the office, Nuñez, Aguilú, and another human resources employee, Denise Colón were waiting. Romero makes no mention of Martínez or Román being present. Once inside, Romero asked what was happening, at which point Colón informed Romero that her services were no longer needed. When Romero asked why she was being terminated, Colón responded that it was because of a series of infractions she had committed. Romero asked what the nature of the alleged infractions were, and Colón replied that she had been informed by Aguilú and Martínez that Romero had billed for additional treatments she had not provided. Romero responded that the accusations were false, that she had simply entered the treatments in the computer to reflect that she had indeed provided the services in question, but had not billed for anything. Colón also made reference to past incidents of misconduct purportedly engaged in by Romero, after which she handed Romero the discharge letter (GCX-8b), took away her pager and identification card, and asked Romero to sign the Galindez and Nuñez reports, which she refused to do. (II:239-240.) Colón did not testify. The record reflects that J. Martínez was also terminated that same day for essentially the same reason as Romero, e.g., for billing for treatments she had not provided to two other patients. (VI:918.)

Discussion

The complaint, as noted, alleges that Romero's discharge violated Section 8(a)(3) and (1) of the Act. Applying the *Wright Line*[33] causation test established by the Board for resolving such 8(a)(3) issues, I find that the General Counsel has established, prima facie, that Romero's discharge was unlawfully motivated by her union activities. The evidence here makes clear, and the Respondent does not dispute, that Romero was one of the Union's strongest and most vocal advocates. According to her credited testimony, Romero served as union delegate, was part of the negotiating team for units A and C, handled employee problems, and served as de facto spokesperson for the Union with the local press during work stoppages. The Respondent, on brief, admits knowing of Romero's active involvement with the Union (RB:30). That the Respondent harbored animus towards the Union and its supporters is evident from its unlawful interference with Melendez' attempts to distribute union literature in its cafeteria, and from its unlawful attempts at having the Union decertified. Further, while not alleged as a violation, Martínez' remark to Romero during a work stoppage just a few months before her discharge, that she was exposing herself too much by talking to the press, could reasonably be viewed as a veiled threat that her outspokenness on the Union's behalf might result in retaliatory measures being taken against her, further supporting a finding of animus. On these facts, I am satisfied that the General Counsel has made a prima facie showing that Romero was discharged in retaliation for her union activities. Accordingly, the burden now shifts to the Respondent to show that it would have discharged Romero on October 26, even she had not been a union supporter or had engaged in Union activities. The Respondent, I find, has not done so here.

The Respondent defends the discharge by claiming that Romero was lawfully terminated for having "a bad disciplinary record" that included "falsely reporting and invoicing respiratory therapy that was not given by her," the latter being an obvious reference to the October 18 treatments involving patients Velasquez and Lopez. (IV:568.) Several factors convince me that the explanation given by Respondent for discharging Romero is nothing more than a pretext.

First, Martínez' claim that J. Martínez, and not Romero, had provided the necessary respiratory therapy treatments to patients Velasquez and Lopez during the October 18 evening shift was based on a rather slipshod investigation conducted by her. Martínez, as noted, claims she became suspicious that either Romero or J. Martínez had billed for treatments not rendered to patients Velasquez and Lopez on noticing that both therapists had recorded treating the two patients in their respective work assignment sheet for the October 18 evening shift.[34] She testi-

failure to discuss the reports with Romero by noting that Romero was out sick on October 23, the day after she received the reports, and had scheduled days off on October 24 and 25. She did not, however, explain why she could not have called Romero at home and discussed the reports with her over the phone during any of the days she was off. Martínez' handling of these two incident stands in stark contrast to another incident purportedly reported to her by Nuñez just two months earlier, in August 1998, involving a workplace dispute between Romero and employee Arroyo. Martínez claims that on receipt of the August report from Nuñez, she called both Romero and Arroyo to the office and, after hearing both sides, concluded that Arroyo was in the wrong and had been disrespectful to Romero. She contends that she issued Arroyo a warning as a result of her conduct and had it placed in Arroyo's file. The warning was never produced at the hearing despite the General Counsel's request for its production.

[33] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel bears the burden of making a prima facie showing that an employer's discharge of an employee was motivated, at least in part, by the employee's union or other protected concerted activity. The General Counsel meets this initial burden by showing that the affected employee was engaged in union activity prior to being discharged, that the employer knew or had reason to believe that the employee was engaged in such activity, that it harbored antiunion animus, and that said animus was a motivating factor for the discharge. If the General Counsel makes such a prima facie showing, the burden shifts to the employer to demonstrate that it would have taken the same action against the employee even without regard to any union or other protected activity the employee may have engaged in. However, to effectively rebut a prima facie case, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *McGraw of Puerto Rico, Inc.*, 322 NLRB 438, 449 (1996); *Reno Hilton*, 282 NLRB 819, 841 (1987). Finally, the General Counsel's burden in these cases is an ultimate burden of "persuasion" as to the "motivating-factor" element, not merely a burden of "coming forward." *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

[34] There is reason to doubt Martínez' claim that the duplicate entries in Romero's and J. Martínez' work assignment sheets for patients Velasquez and Lopez led her to believe that one of the two therapists was claiming credit for treatments not provided. Thus, a review of their

fied that when Romero and J. Martínez each insisted they had treated the named patients, she reviewed the respiratory therapy care notes in the patients' files for the October 18 evening shift and found therapy entries for J. Martínez, but not Romero, in said October 18, notes, and concluded from this that Romero had not treated either Velasquez or Lopez on October 18.

However, the lack of any entry by Romero in the October 18 evening shift respiratory care notes was reasonably explained by Romero who, as noted, testified that her notes for the treatment provided to patient Velasquez that evening were recorded by her in the patient's respiratory therapy care notes used by therapists during the prior October 17 midnight shift, and that her notes for patient Lopez were recorded on separate blank respiratory care note sheets contained in the latter's medical file. Romero's testimony in this regard was uncontradicted.[35] Thus, while Martínez asked Romero if she had treated both patients during her October 18 evening shift, nothing in her testimony suggests that she asked Romero where the entries in the therapy notes she would have made for such treatments might be found.[36] Nor is there anything in Martínez' testimony to suggest that she reviewed the respiratory therapy care notes contained in Velasquez' and Lopez' medical files from shifts immediately preceding or following the October 18 evening shift to determine if Romero may have possibly recorded her notes of the treatments out of sequence, a practice that Romero contends and Martínez admits was not uncommon among therapists at the hospital.

Finally, the Respondent, as previously stated, made no effort to produce the October 17 midnight shift respiratory care notes, where Romero claims she recorded the treatments provided to patient Velasquez, or Lopez' medical file, where the respiratory care note sheets containing Romero's entry of the treatment provided Lopez on October 18, might be found. Had such notes or file been produced and shown not to contain any such entries by Romero, the latter's claim would have been seriously undermined if not wholly discredited. The Respondent, as noted, did not do so, and, moreover, has not contended that the notes were lost, destroyed, or otherwise unavailable for production. In these circumstances, I find it reasonable to believe that the Respondent chose not to produce the October 17, midnight shift or Lopez' medical file because they would have corroborated rather than undermined Romero's testimony. I therefore credit Romero and find that she did indeed record the treatments provided to patients Velasquez and Lopez, respectively, in the October 17, midnight shift respiratory therapy care notes, and on blank respiratory therapy care note sheets.

Had Martínez questioned Romero about the alleged discrepancy between her work assignment sheet showing treatments provided to patients Velasquez and Lopez during her October 18 evening shift, and the absence of any entries by her in the patients' respiratory therapy care for that shift, Romero would in all likelihood have told or shown Martínez where in the patients' medical files her entries could be found, thereby clearing up the alleged discrepancy. Martínez, it would appear, never did so. Further, had Martínez questioned Romero, Ruiz, or the other therapists who worked the October 18 evening shift about the distribution of the "standby" patients during that shift, she would have learned that Romero, not J. Martínez, had been assigned to treat the "standby" patients on the second floor, including patients Velasquez and Lopez in room 292. Again, nothing in Martínez' testimony or elsewhere in the record suggests that she did so. Clearly, such information would have raised questions as to why J. Martínez would have treated patients Velasquez and Lopez when they had not been assigned to her, and might very well have motivated Martínez to look further into the conflicting claims presented to her by Romero and J. Martínez regarding the October 18, therapy treatments provided to patients Velasquez and Lopez.

Instead, Martínez, who knew that therapy notes were not necessarily recorded in any chronological order in a patient's medical file, hastily and, in my view, erroneously, concluded, from her failure to find any treatment notations made by Romero in the October 18, Velasquez and Lopez evening shift respiratory care notes, that Romero did not treat either patient that evening, and had falsely reported doing so in her work assignment sheet. By not questioning Romero about her treatment notes or offering her an opportunity to explain the alleged discrepancy between the entries in her work assignment sheet and the lack of treatment notes in the patients' October 18 respiratory therapy care notes, by only reviewing the respiratory therapy care notes for the October 18, evening shift when she knew full well that there was a likelihood that Romero's treatment notes might have been recorded elsewhere, and by apparently not inquiring into why J. Martínez was claiming to have treated Velasquez and Lopez when Romero, not J. Martinez had been assigned said patients that evening, Martínez, I find, failed to conduct a meaningful investigation into the alleged

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work reports shows that in addition to patients Velasquez and Lopez, Romero and J. Martínez both reported having treated another patient, Maria Morales in room 274, during the same shift. (see RX-14, p. 1 and 2). Martínez, however, never claimed that this duplicate entry for patient Morales in Romero's and J. Martínez' work reports raised any concerns that one or the other therapist had not treated Morales. Nor is there anything to suggest that Martínez conducted an investigation into the duplicate entries for Morales, as she purportedly did with the Velasquez and Lopez entries. There is in this regard nothing in the entries themselves from which Martínez could have assumed that the Morales entries were legitimate while one of two Velasquez/Lopez entries was not. Indeed, the fact that the Morales' entries, unlike the Velasquez/Lopez entries, did not appear to be problematic for Martínez leads me to suspect that such duplicate entries were not uncommon and did not necessarily reflect, as assumed by Martínez regarding the Velasquez/Lopez entries, that an employee was improperly claiming credit for treatments not provided.

[35] The Respondent contends that Romero's claim of having recorded her treatment of Velasquez in the October 17 midnight shift therapy notes is not credible because Hospital records show that Velasquez was not in her room most of that shift but rather was undergoing hemodialysis treatment at another Hospital location and that her medical file, according to Martínez, would have been with Velasquez, making it highly unlikely that Romero could have treated Velasquez and recorded said treatment in the patient's medical file. Martínez, however, was not a credible witness and while I do not doubt her claim that the Hospital generally requires a patient's medical file to remain with the patient who might be transported to some other area, i.e., the Hemodialysis unit, at no time did Martínez claim that this is in fact what transpired on October 18, in Velasquez' case. Thus, she did not claim to have actually seen the medical file in the Hemodialysis unit while Velasquez was receiving her treatment. Rather, her testimony reflected only what *should have* occurred, not what actually took place. The Respondent's attempt to discredit Romero on the basis of such flimsy evidence, and through a witness, Martínez, whose own testimony I find highly suspect, is rejected.

[36] Martínez admitted that her assumptions about Romero not having performed the work was based strictly on her review of the respiratory notes. (VI:829-830.)

misconduct which, according to Respondent, was the primary reason for Romero's discharge. Her failure to adequately investigate the incident supports an inference that Romero's discharge was motivated by some other unlawful, pretextual reason. *Freeman Decorating Co.*, 336 NLRB 1 (2001), *Handicabs, Inc.*, 318 NLRB 890, 897 (1995).

Further, not only did Martínez fail to adequately investigate the Velasquez/Lopez incident, as previously discussed, she also failed to investigate the complaints lodged against Romero by Galindez and Nuñez on or about October 22, both of which were purportedly used by Martínez to justify Romero's discharge. Thus, Martínez, as noted, admitted that she accepted the accusations made by Galindez and Nuñez as true without so much as questioning Romero or the other principals involved in the alleged incidents. Her willingness to accept these complaints against Romero without affording the latter an opportunity refute the allegations lends further support to a finding that the Respondent's stated reasons for the discharge are pretextual. Id., see also *Casa San Miguel*, 320 NLRB 534, 557 (1995).

The pretextual nature of Romero's discharge is also evident from Respondent's reliance on disciplinary action taken against Romero more than a year earlier. Martínez, as noted, admitted that Romero's discharge was based in part on a 4-month suspension and a disciplinary writeup issued to Romero in mid-1997, and November 1997, respectively. The record, however, reveals that in December 1997, following the above two 1997 disciplinary measures taken against her, Romero received a near "Outstanding" rating from her supervisor, Aguilú, in his yearend appraisal of her. In that appraisal, Aguilú described Romero as "an employee that is cooperative, has a great deal of initiative, gives the utmost in her tasks, her performance is excellent." (GCX-9b) The appraisal made no mention of Romero's 1997 suspension and writeup. Aguilú's high rating and glowing remarks of Romero, coupled with the absence of any mention of these incidents in Romero's 1997 appraisal, leads me to believe that Aguilú may have viewed the incidents as past history and as having no further relevance to Romero's subsequent job performance or behavior. In these circumstances, the Respondent's sudden decision to resurrect these two incidents more than a year after their occurrence to support Romero's discharge supports a finding of pretext. *Austell Box Board Corp.*, 249 NLRB 345, 348 (1980). I am convinced that the Respondent, unable to substantiate its claim that Romero had falsely reported treating patients Velasquez and Lopez on October 18, or to justify discharging Romero based solely on the unexamined Galindez and Nuñez reports, dredged up the 1997 incidents in an attempt to lend some legitimacy to the discharge. The Respondent's implicit suggestion on brief (RB:30), that Romero's 1997 disciplinary incidents were properly taken into account in accordance with "progressive principles of personnel discipline" is simply without merit, for the Respondent has produced no evidence to show that it maintains and follows a system of progressive discipline for employees.[37] See, e.g., *Ohio Masonic Home*, 295 NLRB 390, 392 (1989). Its bare claim, without proof, that employees are subject to some progressive disciplinary system, and that it adhered to this system in discharging Romero, will not suffice to meet its burden under *Wright Line*, supra. *GATX Logistics, Inc.*, 323 NLRB 328, 333–334 (1997). Accordingly, for the foregoing reasons, I find that the Respondent has not rebutted the General Counsel's prima facie showing that Romero's discharge was motivated by her support for and activities on behalf of ULEES, and, consequently, conclude that Romero's discharge violated Section 8(a)(3) and (1) of the Act, as alleged.

[37] No evidence, for example, was produced to show what type of conduct would have warranted disciplinary action under the alleged progressive disciplinary system, or whether evidence of past discipline meted out to an employee was expunged from the file after a period of time, e.g., a year, and no longer taken into account in connection with the alleged progressive disciplinary system.

6. The lockout

The record reflects that by letter dated December, 4, ULEES notified the Respondent of its intent to conduct a 48-hour work stoppage among employees in units A and C beginning 7:00 a.m. on December 22, and ending 7a.m., December 24. The letter states that ULEES was conducting the work stoppage because of Respondent's unfair labor practices which the letter describes as including "dilatory tactics," "bad-faith" negotiations," "coercion and threats" to Union delegates and members, and a refusal to comply with ULEES' request for information. In a December 14 letter, ULEES notified the Respondent of its intent to conduct another work stoppage beginning 12 noon on December 31, and ending 7 a.m., January 2, 1999 listing, as reasons therefore, the same reasons stated in its December 4, letter (JXs 6; 7).

Román testified that on receipt of the December 4 strike notice, she met with Hospital Administrator Ivan Colón, and the Hospital's executive board, to determine how best to handle the situation and to make contingency plans to ensure that the Hospital would be able meet its staffing needs for that strike period. On receipt of ULEES' December 14 second strike notice, the executive board again met to address the situation. Román claims that Colón decided, following consultation with the board, to conduct a lockout of employees in units A and C during the period between the two strikes, e.g., beginning 7 a.m., December 24, to noontime, December 31. She did not, however, recollect when the lockout decision was made. Colón himself was unsure when he made the decision. On direct examination by Respondent's counsel, for example, Colón stated the decision was made at a meeting on December 15 or 16, when the Hospital received ULEES' second strike notification. On cross-examination, he stated, with some uncertainty, that the decision was made "possibly between the 16th and the 18 th." (IV:578; 594.) Colón explained that he decided to hold a lockout because he believed it would have been difficult to obtain temporary workers willing to work during the Christmas and New Year's holidays only, but that the workers might be more inclined to accept temporary employment if it included the intervening period between the holidays. Román similarly explained that the Hospital decided to conduct a lockout "to make sure that we could cover the services, and there would be continuity for those services, since it was a very difficult time, it was the Christmas holiday, and the hospital had to continue offering the services to the community. (VII:1107.) She elaborated by stating that it would have been difficult enough to find individuals who would be willing to work during the first strike period, given that it was the Christmas holiday, but that trying to find workers to fill in for the second strike period (during the New Year's holiday) made the situation even more difficult.

Román testified that she prepared a letter on Friday, December 18, notifying ULEES of the Hospital's intent to conduct a lockout from 7 a.m., December 24, to 12 noon, December 31,

and tried to fax it to the Union that same day but was unable to do so because the fax machine was apparently disconnected.[38] (See RX-45.) She admits, however, that she made no effort on December 18, following her alleged inability to fax her letter to the Union, to directly contact any of the union representatives at the Hospital to inform them of the decision, or to provide them with copies of the letter to distribute to employees. (VII:1179.) Román instead instructed her assistant to send the notice out to the Union on Monday, December 21. On December 21, according to Román, her assistant sent out the letter to the Union, and at around 2 p.m. that day, copies of the letter were distributed to employees as they entered the Hospital parking lot to report for work. ULEES admits receiving notification of the lockout on December 22. (CPB:17, fn. 8). By December 21, according to Román, the Hospital had hired some 30 temporary workers to work during the strike and lockout periods.[39] The number of employees in the bargaining units who would be affected by the lockout totaled 500.

Around 8:15 p.m., December 21, Union President Melendez notified Román by phone that ULEES was canceling the strike set to begin the following morning, and that she was being faxed a letter advising her of the cancellation. There is no indication that during this phone conversation, Román informed Melendez of the "lockout" letter that purportedly had been sent to the Union earlier that day. Colón testified that Román notified him of the strike's cancellation soon after she received Melendez' message. At 9:30 p.m. that same evening, Román received the fax mentioned by Melendez. (JX-8.) Román testified that on receiving the fax, she and hospital administrator Colón discussed it by phone with Respondent's legal counsel for more than one-half hour, and expressed to counsel their concern that employees would not report to work notwithstanding ULEES' cancellation of the December 22 strike, and that, if they did report, there might be problems with the temporary replacements. She claims that following the discussion with counsel, a decision was made to advance the lockout to begin at 7 a.m., the following day, rather than December 24. Asked why the lockout had been moved up, Román cited as reasons the fact that ULEES, while canceling its Christmas strike, had not canceled the New Year's strike, and because of the Hospital's concern that services "could not be adequately offered to our patients." (VII:1110-1111.) When asked why the Hospital did not cancel the lockout altogether following ULEES' cancellation of the Christmas strike, Román again cited ULEES' failure to cancel the second strike as a reason,[40] and also claimed that it was because the temporary workers who had been hired by the Hospital for the lockout period, and who regularly worked for other health care institutions, had taken vacation or other types of leave from said institutions to work for the Respondent during the lockout, suggesting implicitly that it would have been unfair not to retain the temporary workers in these circumstances (VII:1114). While there is no question that ULEES did not cancel its second strike, Román's further assertion regarding the temporary workers regular employment or the circumstances by which they came to hired by Respondent is devoid of evidentiary support. More importantly, Román's assertion, that in deciding to continue the lockout the Respondent took into account the adverse effect its cancellation would have on temporary workers, was not cited by Colón, who identified himself as the decision-maker, as a reason for pressing ahead with the lockout. Thus, I place no credence on Román's testimony in this regard and am convinced this was a mere fabrication on her part.

Colón testified that when informed by Román that ULEES had canceled the December 22, strike, he decided to move up the lockout by 2 days to coincide with what would have been the start of the canceled strike. Unlike Román, Colón made no mention in his testimony discussing the matter with Respondent's legal counsel before making his decision, casting further doubt on Román's testimony. As to why he did not cancel and instead extended the lockout, Colón gave several, at times contradictory, reasons, most of which lack evidentiary support and appear based on nothing more than supposition and conjecture. Colón, for example, claims that when notified on the evening of December 21, of ULEES' cancellation of the December 22, strike, he decided not to call unit employees to report for work the following day, and to simply begin the lockout earlier, because "it was going to be very difficult to find all the people . . . who work at 7 a.m." and because he "didn't feel comfortable that people would actually come to work." He explained that because ULEES' notification of the strike's cancellation was received so late on December 21, he doubted the Hospital would have had enough time to contact all unit employees, but did state that had the Hospital been notified sooner, it could have properly "programmed everything," suggesting implicitly that the lockout might have been canceled had he been notified sooner.

Colón, however, contradicted himself on this point. Thus, despite claiming that he did not instruct his supervisors to call unit employees to report for work because they would have had difficulty locating employees, Colón subsequently admitted that supervisors and managers did in fact call unit employees at home that same evening to instruct them *not* to report for work because the lockout had been moved up to 7 a.m., December 22.[41] When pressed by the Charging Party's counsel on this issue, Colón, contrary to his earlier testimony, further admitted that when contacting the unit employees to instruct them not to report for work, the Hospital supervisors and managers could just as easily have informed unit employees that the strike had been canceled and that they should report for work as scheduled the next day.[42] (IV:620.)

[38] It is unclear from Román's testimony if she was referring to the Hospital's or ULEES' fax machine.

[39] Under its subcontracting arrangement, the Hospital could cancel the services of its temporary respiratory therapists with only 3–4 hours prior notice. (VII:1191.)

[40] Roman claims that had ULEES canceled its December 31-January 2, strike, Respondent would have canceled the lockout.

[41] Colón's denial that he instructed his supervisors and managers to call employees at home to tell them about his decision to extend the lockout is rejected as not credible.

[42] The Respondent's assertion on brief (RB:11, fn. 3), that Colón did not try to contact "all 500 [unit] employees" to report for work because "of the sheer number of employees" involved mischaracterizes and, indeed, conflicts with Colón's own rejected claim that he did not try to contact unit employees because he did not think he had enough time to so and because he believed he might not be able to locate them. It also contradicts Colón's admission, and other testimonial evidence (discussed, infra) showing, that employees were in fact called by supervisors and told not to report for work because the lockout had been extended. The Respondent's further explanation in fn. 3 of its brief as to why Colón did not call unit employees—that "the Union had not notified them that the strike had been canceled"—is patently false and contradicted by Colón's and Roman's own testimony that they received verbal notification of the December 22, strike's cancellation at 8 p.m.,

Colón also claimed that he did not ask unit employees to report for work because he feared there might be conflict between unit employees and the temporary workers who were already at the Hospital ready to begin work the following morning, and because unit employees might, in any event, not believe the Hospital's claim that the strike had been canceled and would instead suspect the Hospital was trying to trick them into reporting for work. Colón, however, did not explain what his fear about problems arising between the unit employees and the temporary workers was based on. There is in this regard no evidence of any threats having been directed or made by unit employees towards the temporary replacements, or vice versa, which might have justified Colón's concern. It therefore appears that Colón's concern in this regard was based on nothing more than supposition and conjecture and to have been unfounded. Nor, in any event, do I believe that this unfounded fear by Colón of possible conflict between unit employees and temporary workers was a factor into his decision not to ask his regular workers report for work or to extend the lockout, for Román, who purportedly played an integral role in the decision-making process, did not cite Colón's fear of strife as a reason for the lockout's extension or for not having the unit employees report for work.

Nor do I find credible Colón's other claim that he did not ask unit employees to report for work because employees might not believe the strike was over and would suspect the Hospital was trying to trick them into returning to work. In this regard, I note that Colón admitted that when ULEES advised the Hospital of the strike's cancellation, ULEES also told the Hospital that its employees were "coming to work tomorrow." ULEES' assurance to Respondent that employees would be reporting for work the next day strongly suggests that unit employees had already been notified by ULEES on the evening of December 21, of the strike's cancellation, thereby allaying any doubt Colón may have had that unit employees would not believe their supervisors and managers message of the strike's cancellation. Like the other reasons proffered by Colón for not calling unit employees and extending the lockout, his explanation about the unit employees' possible refusal to take the Hospital at its word is rejected as nothing more than conjecture. Indeed, testimony by Rafael Cintrón (discussed below) that he reported for work on December 22, despite being told by his supervisor the night before not to do so because the lockout had been extended, makes clear that Cintrón, and presumably other unit employees, knew about the strike's cancellation and were willing to report for work, if allowed to do so.

Cintrón works for Respondent as a registration officer and is ULEES' delegate for unit A. He testified to receiving a phone call around 11 p.m., December 21, from his department manager, Luz Conde, instructing him not to report for work on December 22, because the Respondent had declared a lockout. Cintrón denied having any knowledge prior to Conde's phone call that a lockout had been called by Respondent. Cintrón nevertheless reported for work on December 22, at his normal starting time of 6 a.m. On arriving at the Hospital, he was met by Finance Manager Madeline Sierra and Conde. Sierra then asks Cintrón if he had been instructed not to report for work, and the latter replied that he had but had decided to report anyway. After Sierra and Conde leave, Cintrón remained and remarked to some four or five other employees who were present that this was the way "the institution paid the long-time employees, because all the people who were there were long-time employees, and they were kicking us out."[43] Román, he recalls, appeared as he was making his remarks and interjected that the "reprisal" was not against the employees but rather against ULEES. According to Cintrón, one of the employees present, Mayra Betancourt, responded to Román that "ULEES was the same as employees because we were part of the Union." (I:113-114.)

Employee Jose Reyes testified that he also reported for work on December 22, and was likewise told by Sierra and Conde that he was not permitted to work because of the lockout. He recalls that after Sierra and Conde left, he heard Cintrón comment that if "that was the treatment that all the employees were going to receive, that that was fine, that they were just going to leave the Hospital." He further testified that at one point during their conversation, Román appeared and told them that "we shouldn't take it as a personal thing, that they were not against us but rather against the Union." (I:127).

Román recalled being at the Hospital around 6 a.m. on December 22, and hearing Cintrón speaking in a loud voice to several employees. According to Román, Cintrón was telling employees that the lockout was a reprisal against employees and that this was the way the Hospital was paying back its employees for their many years of service. Román claims she told employees who were present that "the lockout was not a reprisal against the employees," but denies saying to employees that the lockout was intended as a reprisal against ULEES. (VII:1116-1118.)

I credit the mutually corroborative testimony of Cintrón and Reyes over Román's denial and find that Román indeed told Cintrón, Reyes, and other employees who were present that the Hospital's lockout was intended as a reprisal against ULEES, and not its employees.[44] Román, as previously discussed, was not a particularly credible witness. The Respondent's suggestion that Román should somehow be believed over Cintrón and Reyes because of testimony by Romero that she had never heard Román make "any kind of antiunion comments" is rejected. Román never testified that Romero was present during her exchange with Cintrón and Reyes, and the mere fact that Romero may not have heard Román make any such comments in the past does not establish that Román could not have made her antiunion remark to Cintrón and Reyes on December 22. Accordingly, Román's denial that she made the antiunion remark attributed to her by Cintrón and Reyes is rejected. Further, her remark was clearly coercive. Román's assurance to unit employees that the Hospital was retaliating against ULEES, and not against them, could not have been of much comfort to employees, for it was the unit employees who were being adversely affected by lockout by being denied work dur-

on December 21, and a faxed letter from ULEES a few hours later confirming the cancellation.

[43] Cintrón specifically recalled admissions employee Jose Reyes, and laboratory employees Mayra Bentancourt and Mary Rivera being present.

[44] While Reyes' version of what Román said does not specifically mention the lockout as the subject of Román's remark, I am convinced that this was clearly its intended meaning. The Respondent on brief apparently accepts this interpretation of Reyes' testimony for it asserts that the only evidence of animus produced by the General Counsel regarding the lockout was limited to Cintrón's and Reyes' testimony, "both of which testified that . . . Román . . . allegedly said that the lockout was directed at the Union, not the employees."

ing the lockout period. Employees, I am convinced, would reasonably believe that it was their support for ULEES, not any general animosity held by Respondent towards ULEES, which prompted the Respondent to lock them out. As such, Román's remark could likely have the effect of causing employees to withdraw their support from ULEES, rendering it coercive. Accordingly, I find that the Respondent, through Román, violated Section 8(a)(1) by telling employees that the December 22–31 lockout was called as a reprisal against ULEES.

Discussion

The complaint alleges that the Respondent's lockout of employees from December 22–31, violated Section 8(a)(3) and (1) of the Act. I find merit in the allegation. Initially, it bears noting that lockouts are not in and of themselves unlawful. Rather, a lockout is deemed to be unlawful only when it is primarily motivated by antiunion animus. See *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965), *NLRB v. Brown Food Store*, 380 U.S. 278 (1965). In deciding whether an employer's lockout is motivated by antiunion animus in violation of Section 8(a)(3), the Board applies the standards developed by the Supreme Court in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Thus, under *Great Dane*, if an employer's alleged discriminatory conduct is found to be "inherently destructive" of employee rights, then proof that the alleged misconduct was motivated by antiunion considerations is not required, and the Board may find an unfair labor practice even if there is evidence to show that the employer was motivated by business considerations. However, proof of an antiunion motive is required where the effect of an employer's discriminatory conduct is only "comparatively slight," and the employer has demonstrated a legitimate and substantial business justification for its actions. In either case, once it has been shown that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is on the employer to establish that it was motivated by legitimate objectives. Id at 34.

The question of which of the two *Great Dane* standards applies to the lockout in this case requires little discussion, for the Board and the courts have held that lockouts, standing alone, are not "inherently destructive of employee rights," and are generally viewed as having only a "comparatively slight" impact on such rights. See, e.g., *Central Illinois Public Service Co.*, 326 NLRB 928, 930 (1998), rev. denied 215 F.3d 11 (D.C. Cir. 2000); *Harter Equipment, Inc.*, 280 NLRB 597 (1986), rev. denied 829 F.2d 458 (3d Cir. 1987); *Boilermakers Local 88 v. NLRB*, 858 F.2d 756 (D.C. Cir. 1988). The above cases thus make patently clear that the legality of the Respondent's lockout is to be determined using the *Great Dane* "comparatively slight" impact test. If the Respondent is to avoid liability under Section 8(a)(3) and (1) for the lockout, it must, as noted, produce evidence that it had "legitimate and substantial business justifications" for its conduct. *Great Dane*, supra at 33. The Respondent, I find, has not done so here.

The Respondent's lockout, as noted, was initially intended to cover the period between 7 a.m., December 24, when the first ULEES strike was scheduled to end, and the start of the second strike at 12 noon, December 31. The Respondent contends that its decision to conduct a lockout and hire temporary employees for that period was motivated solely by a need to ensure a "continuity of patient-care services" for the community and to avoid an interruption of services that might be caused by the two separate strikes. More precisely, the Respondent explained that because of "concerns" it had that temporary workers might be unwilling to work during the holiday strike periods only, it decided to conduct the lockout so as to make it more attractive for temporary workers to accept this longer period of employment. However, other than Colón's and Román's unsubstantiated claim that the Hospital would not have been able to hire sufficient workers to man its facility during the two strikes without resorting to the lockout, there is no evidence to show that the Respondent had, in fact, experienced difficulty in recruiting individuals to work during either or both of the strike periods only, or that it even attempted to do so. Thus, neither Colón nor Román testified that they, or other hospital officials for that matter, had engaged in such recruitment efforts before concluding that a lockout was needed to attract temporary workers. In fact, Colón admits that the search for temporary workers to replace the locked out employees began *after* the lockout decision was made. (IV:595.) Their claim, therefore, that the lockout was called because of the Hospital's difficulty in recruiting temporary employees to work during either or both holiday strike periods only was based on nothing more than speculation, as the Respondent had not yet attempted to hire workers for these two periods when it declared the lockout.

The Respondent's stated justification for instituting a lockout during the period between strikes—that without it the Hospital would have been unable to recruit the temporary workers needed to properly staff the Hospital during both strikes—therefore lacks any evidentiary support and is based on nothing more than supposition and conjecture. The Respondent in this regard has neither claimed nor shown that its professed concern about the difficulty it would have in recruiting temporary workers during the Christmas/New Years' holiday strikes was based on a similar past experience. It is, of course, quite possible that, as theorized by the Respondent, it might have experienced some difficulty in recruiting temporary employees willing to work during the two strike periods only. It is, however, no less plausible to believe that temporary workers might very well have been willing to accept such limited employment in order to supplement their income. The simple fact is that the Respondent has produced no evidence to substantiate its claim that the lockout was needed to ensure that its facility would be adequately staffed during the two strike periods, or to justify moving up the start of the lockout from December 22–24. In the absence of such supporting evidence, the Respondent's bare explanations for calling a lockout and for thereafter moving up its starting date does not, in my view, suffice to satisfy the Respondent's requirement under *Great Dane* of establishing that it had "legitimate and substantial business justifications" for its actions. *Drew Division of Ashland Chemical Co.*, 336 NLRB 477, 481 (2001); *ConAgra, Inc.*, 321 NLRB 944, 964 (1996).

Further, not only is there no evidence to support the Respondent's stated reasons for the lockout or its advancement from December 22–24, but Cintrón's and Reyes' credited and mutually corroborative testimony that Román told them and other employees standing nearby that the lockout was intended as a reprisal against ULEES, makes patently clear that the lockout was motivated not by legitimate business reasons, but rather by antiunion animus.[45] Indeed, Román's remarks, found herein to

[45] Under *Great Dane*, an employer's failure to establish a legitimate and substantial business justification for a lockout having only a comparatively slight impact on employee rights renders the lockout unlaw-

be unlawful, convince me that the Respondent's decision to conduct and extend the lockout was intended to encourage employees into withdrawing their support for ULEES. Such an inference is warranted not just from Roman's remarks, but also from the other unlawful conduct engaged in by Respondent, including its unlawful discharge of leading union activist Romero just 2 months prior to the lockout, and its attempts soon after the lockout to rid itself of ULEES by soliciting and encouraging unit employees to circulate and sign a decertification petition. In light of Cintrón's and Reyes' testimony and other evidence showing that antiunion animus was a motivating factor in the decision to conduct the lockout, and the Respondent's failure to come forth with any credible evidence to show that it had legitimate and substantial business reasons for the lockout and for its decision to advance the lockout, I find that the lockout was indeed discriminatorily motivated and violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Sociedad Española de Auxilio Mutuo y Beneficencia de Puerto Rico a/k/a Hospital Español Auxilio Mutuo de Puerto Rico, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Unidad Laboral de Enfermeras(os) y Empleados de la Salud, or ULEES, is a labor organization within the meaning of Section 2(5) of the Act.

3. ULEES is the exclusive certified bargaining representative of the Respondent's employees in the following bargaining units:

> Unit A
>
> All receptionists, orderlies (escoltas), ward clerks, office clerks, data entry operators, telemetry technicians, dialysis reuse technicians, orthopedic technicians, medical record technicians, supply technicians, registration clerks, EKG technicians, X-ray transcribers, telephone operators, general assistants, utilization messengers, pharmacy cashiers, communications technicians, and cast technicians, all officers in the hemodialysis, emergency room, purchasing, admissions, and utilization departments; and all secretaries in the respiratory therapy, renal transplant, operating room, emergency room, purchasing, social work, medical education, medicine, and utilization departments, employed by the Employer at its hospital located in Hato Rey, Puerto Rico; but excluding, all other employees, physicians, professional employees, registered nurses, licensed practical nurses, nurses' aides, maintenance employees, the office clerks and secretaries in the human resources, administration, payroll, medical faculty, nursing central office, and HMO departments, guards and supervisors as defined in the Act.
>
> Unit C
>
> All technical employees employed by the Employer at its Hospital located at Hato Rey, Puerto Rico, including respiratory therapists, respiratory therapist technicians, angiography technicians, medical emergency technicians, radiology technicians, assistant pharmacists (auxiliar de farmacia), physical therapy assistants, and operating room technicians, excluding all other employees, registered nurses, licensed practical nurses, nurses' aides, maintenance employees, the employees included in Unit A and Unit B, the office clerks in human resources, administration, payroll, medical faculty, nursing central office, and HMO departments, guards, and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(1) of the Act when, on October 13, 1998, it prohibited employee Ana Consuelo Melendez from distributing ULEES literature in its cafeteria during her nonworktime, by sponsoring, supporting and encouraging employees to file a petition to decertify the ULEES as their bargaining representative, and by telling employees they were being locked out as a reprisal against ULEES.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Elsa Romero on October 26, 1998, for her activities on behalf of ULEES, and by locking out unit A and unit C employees from December 22–31, 1998, as a reprisal against the Union.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting out X-ray technician unit work to GK Professional Services, and respiratory therapy unit work first to CTC, and then to Respicare, without giving ULEES prior notice and an opportunity to bargain over said decisions and their effect on unit employees.

7. The above-described unlawful conduct constitute unfair labor practices affecting commerce with the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy its unlawful subcontracting of unit work, the Respondent will be required to discontinue subcontracting its X-ray technicians' unit work to GK Professional Services and its respiratory therapy unit work to Respicare, and to bargain, on request, with ULEES over any such decisions and their effect on unit employees.[46] Having found that its December 22–31, 1998 lockout of unit A and unit C employees was unlawful, the Respondent will be required to make said employees whole for any loss of pay and other benefits incurred by them as a result of the lockout, with the amounts owed to be determined in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on such amounts to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To remedy its unlawful discharge of employee Elsa Romero, the Respondent will be required, within 14 days from the date of this Order, to offer Romero full reinstatement to her former position or, if that position no longer exists, to a substantially

ful without the need to show that the lockout was motivated by antiunion animus. See *Conoco, Inc. v. NLRB*, 740 F.2d 811, 814 (10th Cir. 1984), enfg. 265 NLRB 819 (1982). As the Respondent in this case has not met its burden under *Great Dane*, it follows that the lockout was indeed unlawful. However, even if the Respondent's unsubstantiated explanation for locking out its employees were deemed sufficient to satisfy its burden under *Great Dane*, the General Counsel, as found infra, has nevertheless come forward with sufficient credible evidence to show that the lockout was discriminatorily motivated by antiunion considerations.

[46] No claim or showing has been made here that any unit employee was displaced or lost work or pay as a result of the Respondent's subcontracting decisions. Accordingly, no reinstatement or backpay remedial relief is needed for the unilateral subcontracting violations.

equivalent position, without prejudice to the seniority or other rights and privileges she previously enjoyed. The Respondent will also be ordered to make Romero whole for any loss of earnings and other benefits she may have suffered because of her unlawful discharge, in the manner prescribed in *F. W. Woolworth Co.*, supra, with interest to be computed in accordance with *New Horizons for the Retarded*, supra. It will also be required to expunge from its files any and all references to Romero's unlawful discharge, and to notify her in writing that this has been done. Finally, the Respondent shall be required to post a notice assuring the employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Sociedad Española de Auxilio Mutuo y Beneficencia de Puerto Rico a/k/a Hospital Español Auxilio Mutuo de Puerto Rico, Hato Rey, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Contracting out bargaining unit work without first notifying the Union about its decision, and affording it an opportunity to bargain over the decision and its effect on bargaining unit employees.

(b) Discouraging membership in ULEES or in any other labor organization by conducting a lockout of employees as a reprisal against ULEES.

(c) Discharging, or otherwise discriminating, against employee Elsa Romero or any other employee for supporting ULEES, or any other union.

(d) Interfering with employees' Section 7 rights by prohibiting them from distributing union literature during nonworktime in the Hospital's cafeteria, by sponsoring, supporting, or encouraging unit employees to file a decertification petition, and telling employees that the lockout was meant as a reprisal against ULEES.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Discontinue subcontracting its X-ray technician unit work to GK Professional Services and its respiratory therapy unit work to Respicare, and on request, bargain with ULEES over any decision to subcontract out bargaining unit work and its effect on unit employees.

(b) Make whole employees in bargaining units A and C for any loss in pay and benefits they may have suffered due to the lockout conducted from December 22–31, 1998, with interest as set forth in the "Remedy" section of this decision.

(c) Within 14 days from the date of this Order, offer Elsa Romero full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Elsa Romero whole for any loss of earnings and benefits suffered by her as a result of her unlawful discharge, with interest, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to Romero's unlawful discharge and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in San Juan, Puerto Rico, in English and Spanish, copies of the attached notice marked "Appendix"[48] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 1998.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to bargain collectively with the ULEES by unilaterally subcontracting bargaining unit work.

WE WILL NOT sponsor, support, and encourage the filing of a decertification petition.

WE WILL NOT lock out employees in order to retaliate against ULEES and thereby discourage employee support for ULEES.

WE WILL NOT discharge employee Elsa Romero or any other employee because of her support for and activities on behalf of ULEES.

WE WILL NOT interfere with our employees' right to engage in protected concerted activities in the nonpatient care areas of our facility by refusing to allow them to distribute ULEES or other union literature in our hospital cafeteria during their nonwork hours, by sponsoring, supporting, or encouraging them to file a decertification petition, and by telling them that the lockout conducted between December 22 and 31, 1998, was meant as a reprisal against ULEES.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL discontinue subcontracting bargaining unit work to GK Professional Services and Respicare, and WE WILL notify and, on request, bargain with ULEES over any decision to subcontract out bargaining unit work, and over the effects of such decision on unit employees.

WE WILL make whole employees in unit A and unit C for any loss of pay and benefits sustained by them because of the unlawful lockout we conducted between December 22 and December 31, 1998, with interest.

WE WILL, within 14 days from the date of the Board's Order, offer Elsa Romero full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Elsa Romero, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

SOCIEDAD ESPAÑOLA DE AUXILIO MUTUO Y BENEFICENCIA DE P.R. A/K/A HOSPITAL ESPAÑOL AUXILIO MUTUO DE PUERTO RICO